

NAVAL WAR COLLEGE

International Law Situations

WITH SOLUTIONS AND NOTES

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P R E F A C E

This annual volume, prepared by George Grafton Wilson, LL. D., professor of international law at Harvard University, covers the situations and discussions on this subject by the War College class of 1932. Professor Wilson's method has been to propound situations involving timely questions and after critical discussion to organize the material for publication. This procedure has led to the production of a series of studies of live questions on the maritime phases of international law, unique in design, but which should prove useful to officers and others whose profession takes them within the realm of international law. The situations in this volume touch upon many debatable aspects of the use of coastal waters.

In order to increase the usefulness of this publication, suggestions and criticism will be welcomed by the War College covering both topics and situations.

HARRIS LANING,

Rear Admiral, United States Navy,

President United States Naval War College.

JUNE 17, 1932.

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SITUATION I

NEUTRALITY AND AIRCRAFT

States X and Y are at war. Other states are neutral.

(a) A dirigible, belonging to the air forces of the State X, arrives at a commercial airport of State Z, and the commander requests that the hydrogen, with which it is filled, be replaced by helium, purchased before the war, but in storage undelivered at the airport.

What reply should the government of State Z give?

(b) A naval aircraft of State X of the largest seaplane type is forced down from mechanical causes in the open sea off the coast of State Z. Help is requested and the plane is towed by a local vessel to safe moorings within harbor of Z. In the quiet waters of the harbor, the crew effect necessary repairs in 24 hours, and the commanding officer requests permission to proceed.

What reply should the government of State Z give?

SOLUTION

(a) The government of State Z should deny the request of the commander of the dirigible of the air forces of State X to replace the hydrogen by helium.

(b) The government of State Z should intern the seaplane and its personnel.

Definitions.—Aircraft as used in air navigation in the Panama Canal Zone is defined as “any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air, except a parachute or other contrivance designed for such navigation but used primarily as safety equipment.” (Regulations to Govern

Air Navigation in the Canal Zone, September 22, 1931, sec. 11 and Appendix 2.)

Air space is "construed to mean the air vertically overlying any area that may be designated," and "The Panama Canal Zone including the 'three-mile limit'" was designated in 1926 "to be a Military Airspace Reservation." (44 U. S. Stat. 568.)

Early regulation of aerial navigation.—While there have been advocates of the doctrine of freedom of the air, in practice, states have tended to regulate the use of superjacent space by aircraft. Early regulations were mainly of the nature of national police control to prevent damage to property and persons by balloons. For many years, aerial navigation was for the most part a spectacular experiment involving risks against which each state endeavored to provide. National regulation therefore preceded international.

Discussion of international regulations was carried on before long-range flights were common. The Institute of International Law at its session in Ghent in 1906 adopted in its proposed international regulation of wireless telegraphy as "Article 1. The air is free. States have over it, in time of peace and in time of war, only the rights necessary for their preservation." Subsequent study by the institute materially changed the point of view and at the meeting at Madrid in 1911 an article on the legal status of aircraft was adopted as follows:

3. International aerial circulation is free, saving the right of subjacent States to take certain measures, to be determined, to ensure their own security and that of the persons and property of their inhabitants. (Resolutions of the Institute of International Law, Carnegie Endowment for International Peace, p. 171.)

Institute of International Law, 1927.—The institute at the session of 1927 at Lausanne adopted, after discussion of the conflicting theories of the sovereignty and

of the freedom of the air, the following as a proposed regulation of aerial navigation:

Art. 1. Il appartient à chaque Etat de régler l'usage de l'air au-dessus de son territoire, en tenant compte d'une part des nécessités de la circulation aérienne internationale (atterrissage compris), d'autre part, des nécessités de la sécurité nationale, tant au point de vue militaire, douanier, sanitaire, qu'au point de vue de la protection des personnes et des biens de ses habitants.

Art. 3. N'ont pas droit au régime de libre circulation internationale, les aéronefs affectés au service de la puissance publique d'un Etat et les aéronefs faisant partie du matériel de guerre d'un Etat ou commande par un militaire commissionné à cet effect. (33 Annuaire, Institut de Droit International, vol. 3, pp. 337, 338.)

Later regulations.—The freedom of aerial navigation was not generally accepted, however, and states made regulations restricting the use both of national and foreign aircraft. Sometimes, even, the regulations of adjoining subdivisions of a state were not in conformity. The convention relating to the regulation of air navigation, signed at Paris, October 13, 1919, states:

Art. 1. The high contracting parties recognize that every power has complete and exclusive sovereignty over the air space above its territory.

For the purpose of the present convention the territory of a state shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto. (1929, Naval War College, International Law Situations, p. 26.)

The same principle was affirmed at Havana in 1928 in the convention on commercial aviation.

National and international rules for registration, indemnification, flight, landing, etc., have rapidly developed. Government control has been easy because states seeking to dominate or lead in aviation have willingly granted subsidies to companies engaged both in manufacture and operation of aircraft. France seems to have increased subsidies so that the amount for 1929

was more than one hundred times the amount of 1919. Other states have followed varying systems of aiding private or quasi-private companies and there are differing opinions as to the merits of the respective systems.

Conditions of registration.—The conditions of registration vary and may in some instances determine the treatment to which an aircraft is liable in a foreign state whether that state be belligerent or neutral. In the case of the Panama Canal Zone certain prerequisites condition licensing and registration.

1. An aircraft, to be entitled to license and registry, must be airworthy and equipped in accordance with the requirements of the Canal Zone and owned by

- (a) A citizen of the United States.

- (b) The Government of the United States, a State, Territory, or possession, or a political subdivision thereof.

Undoubtedly war would be a "time of emergency" and it would be difficult for a neutral to determine long in advance how a modern machine like a private aircraft even thus registered should be treated. An aircraft of an enemy at the outbreak of war in a belligerent state might be seized and such an aircraft subsequently entering belligerent jurisdiction would be likewise seized.

Communication by air.—Whatever the differences of opinion in regard to the systems and regulation of aerial communication, there is no difference of opinion as to the present necessity of such communication both in time of peace and in time of war. While in the early stages of the development of aerial communication states viewed with comparative indifference the use of the superjacent air, now this use is in many states jealously guarded as would be a railway right of way across its territory, and foreign airlines are in general under restrictions prescribed in article 15 of the convention of 1919 which provides that "The establishment of international airways should be subject to the consent of the states flown over." In some respects the slogan "free-

dom of the seas" is being superseded by the slogan "freedom of the air," but is meeting with little approval.

Indirect limitation on aircraft.—While there may in some states be no direct limitation upon the use or number of foreign aircraft within their territorial jurisdiction, indirect limitation may arise through rules requiring landing at certain places, etc., in the time of peace. Naval powers have also been limited indirectly by conventions such as the Washington Convention of 1922 prescribing the character and the use of naval vessels as aircraft carriers.

Proclamation regarding Panama, 1914.—One of the earliest statements made by the United States in regard to aircraft was in the proclamation of November 13, 1914, concerning the neutrality of the Panama Canal Zone. While the preamble states that the United States exercises sovereignty in the land and waters of the zone, the articles assume the right to exercise authority in the superjacent air.

Whereas the United States is neutral in the present war and whereas the United States exercises sovereignty in the land and waters of the Canal Zone and is authorized by its treaty with Panama of February 26, 1904, to maintain neutrality in the cities of Panama and Colon, and the harbors adjacent to the said cities: * * *

Rule 15.—Aircraft of a belligerent power, public or private, are forbidden to descend or arise within the jurisdiction of the United States at the Canal Zone, or to pass through the air spaces above the lands and waters within said jurisdiction.

Rule 16.—For the purpose of these rules the Canal Zone includes the cities of Panama and Colon and the harbors adjacent to the said cities. (1915, Naval War College, International Law Topics, p. 11.)

Limitation, treaty of Versailles, 1919.—Part V of the treaty of Versailles, 1919, has as its introductory clause:

In order to render possible the initiation of a general limitation of the armaments of all nations, Germany undertakes strictly to observe the military, naval and air clauses which follow. (1919, Naval War College, International Law Documents, p. 70.)

In carrying out this purpose, article 198 prescribed that "The armed forces of Germany must not include any military or naval air forces."

Other articles to remain in force till January 1, 1923, unless Germany had previously become a member of the family of nations, gave the Allied and Associated Powers privileges similar to those of German aircraft.

Article 313. The aircraft of the Allied and Associated Powers shall have full liberty of passage and landing over and in the territory and territorial waters of Germany, and shall enjoy the same privileges as German aircraft, particularly in case of distress by land and sea.

Article 314. The aircraft of the Allied and Associated Powers shall, while in transit to any foreign country whatever, enjoy the right of flying over the territory and territorial waters of Germany without landing, subject always to any regulations which may be made by Germany, and which shall be applicable equally to the aircraft of Germany and to those of the Allied and Associated countries.

Article 315. All aerodromes in Germany open to national public traffic shall be open for the aircraft of the Allied and Associated Powers, and in any such aerodrome such aircraft shall be treated on a footing of equality with German aircraft as regards charges of every description, including charges for landing and accommodation. (Ibid, p. 156.)

These limitations were not such as the Allied Powers would propose as the basis for general regulations to prevail among themselves. Indeed, the Allied Powers would probably not wish such regulations to prevail even for themselves after normal relations were reestablished as geographical and other conditions might give unequal advantages to some of their number.

Laws of the United States.—By an act of May 20, 1926, the use of aircraft was prescribed and it was stated that—

The Congress hereby declares that the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone. Aircraft a part of the armed forces of any foreign nation shall not be navigated

in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State. (44 U. S. Stat. 572.)

Definitions of terms used in the act were given and some of these have been embodied in treaties, regulations, etc.

Prohibited carriage.—By Executive order of February 18, 1929, issued in accordance with the act of August 24, 1912 (37 U. S. Stat. 560) :

a. The carriage by private aircraft of arms and munitions of war, and of such articles as are or may be prohibited by law and regulations of the United States in force in the Panama Canal Zone or of the State in which the aircraft is registered is prohibited.

b. Express license and authority must be procured from authorized Panama Canal Zone officials for the carriage in private aircraft of arms for hunting or protection of crew and cargo, commercial explosives, photographic apparatus not boxed and sealed, and such other articles as the Governor of the Panama Canal may prescribe.

Regulations in general.—It is now generally admitted that regulations for the use of aircraft may have some analogies to the regulations for the use of naval craft, yet aerial navigation is so unlike maritime navigation that analogies are often very misleading. The time element in the use of aircraft as well as the space element is, in many respects, unlike that in the use of naval craft. The increased range of vision introduces other problems which have led to propositions to extend the aerial zone beyond the commonly accepted 3-mile maritime zone of jurisdiction.

There would still remain certain problems as to using higher aerial zones along the frontier of adjacent states. In any case it is recognized that there are differences in the nature of the use of the air over land and over territorial waters.

Commission of Jurists, 1923.—The use of higher aerial zones at sea was one of the matters under consideration by the Commission of Jurists to consider and report

upon the Revision of the Rules of Warfare at The Hague in 1923. The Italian delegate particularly advocated a 10-mile national jurisdiction for aerial purposes while not proposing a change in maritime jurisdiction. The commission did not regard the proposal as practicable, calling attention to the case in which a neutral state, which maintained the 3-mile limit of maritime jurisdiction, might desire to take action against a belligerent hydroplane flying within 10 miles of the coast but over the high seas. The hydroplane might alight and at once be outside neutral jurisdiction and on the high seas. The report of the commission said:

On principle it would seem that the jurisdiction in the air-space should be appurtenant to the territorial jurisdiction enjoyed beneath it, and that in the absence of a territorial jurisdiction beneath, there is no sound basis for jurisdiction in the air.

Furthermore, it is felt that the obligation to enforce respect for neutral rights throughout a 10-mile belt would impose an increased burden on neutral Powers without adequate compensating advantages. Even with this wider belt it would still be easy for airmen fighting in the air to lose their bearings in the heat of the combat, and to encroach inadvertently on neutral jurisdiction. Lastly, the greater the distance from the coast, the more difficult it is for the position of an aircraft to be determined with precision, and the more frequent, therefore, will disputes become between belligerent and neutral States as to violation by the former's aircraft of the latter's jurisdiction. (1924, Naval War College, International Law Documents, p. 152.)

The Italian delegation while renouncing further immediate consideration of the proposition states that—

1. It does not think it desirable to resume in Plenary Commission the discussion of a question which has on several occasions been considered in all the necessary detail during the meetings of the Sub-Committee.

2. Nevertheless, although the majority of the Delegations have already put forward views opposed to its proposal, it continues to believe in the importance of that proposal and in the necessity for its adoption and insertion in an international convention.

3. From the point of view both of belligerent and of neutral States, there are reasons of the highest juridical and technical

importance which make it indispensable to allow each State the power of including in its jurisdiction the atmospheric space to a distance of 10 miles from its coast.

4. The difficulties resulting from the difference between the width of the marginal air-belt and the width of national territorial waters would not seem to be so serious as to render the Italian proposal unacceptable in practice.

5. In any case, there is no juridical obstacle to the fixing of the same width of space for the marginal air-belt as for territorial waters, the Italian Delegation being of opinion that international law, as generally recognised, contains no rule prohibiting a State from extending its territorial waters to a distance of 10 sea-miles from its coasts.

6. In conclusion, it urges that a question of such paramount importance should be reopened and placed upon the agenda of a conference in the near future. (Ibid, p. 153.)

League of Nations Commission.—The League of Nations Preparatory Commission for the Disarmament Conference considered the question of limitation of air armament from time to time. There seemed to be a general opinion that civil aircraft would play a very important part in any war that might arise. It was proposed that aircraft be distinguished by type, anticipating that one type would be characteristically military and another civil. It was admitted that such distinctive types had not yet evolved. It was also admitted that in any attempt at limitation of air forces, it would be difficult to determine the potential air personnel and even more difficult to determine air material in reserve. Much difficulty was experienced in defining clearly the term "in reserve." Some regarded material in reserve as merely substitute material provided for emergency need of aircraft in commission; some would extend the idea to cover material that could be mobilized in case of need and others admitted that no satisfactory determination could be made. There were also many problems in marking off civil aviation undertakings from military and strategic.

Draft Convention, 1930.—The Draft Convention prepared by the Preparatory Commission for the Disarm-

ament Conference in referring to air armament in article 28 embodied the provision, "No preparations shall be made in civil aircraft in time of peace for the installation of warlike armaments for the purpose of converting such aircraft into military aircraft." (League of Nations, C. 4, M. 4, 1931, IX (C. P. D. (1)), p. 607.) Other provisions were also embodied to distinguish military and private aircraft. In the preliminary discussions of the commission, however, many differences of opinion were manifest.

Application of rules.—Rules for land and maritime warfare have become fairly well established. It has been argued that these so far as their principles are applicable be extended to the air. Some of these rules may doubtless be applicable. The following might be in this category even if it afforded no final criteria for opinion:

XIII, HAGUE CONVENTION, RIGHTS AND DUTIES OF NEUTRAL POWERS IN MARITIME WAR

Art. 1. Belligerents are bound to respect the sovereign rights of neutral Powers, and to abstain, in neutral territory or neutral waters, from all acts which would constitute, on the part of the neutral Powers, which knowingly permitted them, a non-fulfilment of their neutrality.

There has been much discussion as to whether an aircraft is a means of transportation and analogous to a maritime vessel or an instrument of war and analogous to a projectile, i. e. a winged intelligent projectile. In any case it is an instrument in which the time and space elements in the region above the earth's surface have been reduced to the minimum.

American-German correspondence, 1915.—On January 19, 1915, the German ambassador raised question with the Secretary of State as to the delivery of hydro-aeroplanes by a neutral firm to a belligerent state. The German position was stated as follows:

There is no doubt that hydro-aeroplanes must be regarded as war vessels whose delivery to belligerents states by neutrals should be stopped under Article 8 of the thirteenth convention of the Second Hague Conference of October 18, 1907. Hydro-aeroplanes are not mentioned by name in the convention simply because there was none in 1907 at the time of the conference. (1915, Foreign Relations, Supplement, p. 777.)

To the letter of the German ambassador, Secretary of State Bryan replied on January 29:

Excellency: I have the honor to acknowledge the receipt of your excellency's note of the 19th instant, and in reply have to inform you that the statements contained in your excellency's note have received my careful consideration in view of the earnest purpose of this Government to perform every duty which is imposed upon it as a neutral by treaty stipulation and international law.

The essential statement in your note, which implies an obligation on the part of this Government to interfere in the sale and delivery of hydro-aeroplanes to belligerent powers, is:

"There is no doubt that hydro-aeroplanes must be regarded as war vessels whose delivery to belligerent states by neutrals should be stopped under Article 8 of the thirteenth convention of the Second Hague Conference of October 18, 1907."

As to this assertion of the character of hydro-aeroplanes I submit the following comments: The fact that a hydro-aeroplane is fitted with apparatus to rise from and alight upon the sea does not in my opinion give it the character of a vessel any more than the wheels attached to an aeroplane fitting it to rise from and alight upon land give the latter the character of a land vehicle. Both the hydro-aeroplane and the aeroplane are essentially aircraft; as an aid in military operations they can only be used in the air. The fact that one starts its flight from the surface of the sea and the other from the land is a mere incident which in no way affects their aerial character.

In view of these facts I must dissent from your excellency's assertion that "there is no doubt that hydro-aeroplanes must be regarded as war vessels," and consequently I do not regard the obligations imposed by treaty or by the accepted rules of international law applicable to aircraft of any sort.

In this connection I further call to your excellency's attention that according to the latest advices received by this Department the German Imperial Government include "balloons and flying machines and their component parts" in the list of conditional

contraband, and that in the Imperial prize ordinance, drafted September 30, 1909, and issued in the Reichs-Gesetzblatt on August 3, 1914, appear as conditional contraband "airships and flying machines" (Article 23, section 8). It thus appears that the Imperial Government have placed and still retain aircraft of all descriptions in the class of conditional contraband, for which no special treatment involving neutral duty is, so far as I am advised, provided by any treaty to which the United States is a signatory or adhering power.

As in the views of this Department the provisions of Convention XIII of the Second Hague Convention do not apply to hydro-aeroplanes I do not consider it necessary to discuss the question as to whether those provisions are in force during the present war. (Ibid, p. 780.)

Neutrality proclamation, 1914.—Under accepted principles of international law a neutral state may not directly or indirectly supply a belligerent with materials of war or allow its ports to be used as bases by belligerents.

Question has been raised as to whether supplies or war material purchased before the war and still within neutral jurisdiction may be withdrawn by the belligerent during the war.

The proclamation of neutrality of the United States in 1914 stated that—

Whereas the laws and treaties of the United States, without interfering with the free expression of opinion and sympathy, or with the commercial manufacture or sale of arms or munitions of war, nevertheless impose upon all persons who may be within their territory and jurisdiction the duty of an impartial neutrality during the existence of the contest;

And whereas it is the duty of a neutral government not to permit or suffer the making of its waters subservient to the purposes of war; * * *

The following acts are forbidden to be done, under severe penalties, within the territory and jurisdiction of the United States, to wit:

8. Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either of the said belligerents. * * *

10. Increasing or augmenting, or procuring to be increased or augmented, or knowingly being concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship of war, cruiser, or armed vessel in the service of either of the said belligerents, or belonging to the subjects of either, by adding to the number of guns of such vessels, or by changing those on board of her for guns of a larger caliber.

This proclamation also provided that—

no ship of war or privateer of any belligerent shall be permitted to make use of any port, harbor, roadstead, or other waters within the jurisdiction of the United States as a station or place of resort for any warlike purpose or for the purpose of obtaining any facilities of warlike equipment; (1915, Naval War College. International Law Topics, p. 7.)

These principles would extend equally to aircraft or other new means of warfare.

Supplies.—It is evident that law relating to certain aspects of the rights and duties of states in the super-jacent air in the time of war is not yet clearly established. In many phases there are possible analogies to the principles of the law of maritime and land warfare. The fact that time and space are greatly reduced as factors in movement of aerial warcraft as compared with naval warcraft becomes a matter of great significance. Some states have accordingly prohibited to military aircraft any entrance to their jurisdiction. It is now a generally accepted principle that the belligerent should not use and that the neutral should not permit the use of its territory as a base. The fuel of an aircraft is at present a most important element in its use. To afford safe port for the exchange of a less serviceable fuel for a more serviceable fuel would not be merely to render the aircraft airworthy, but would be permitting the use of the airport as a base and should accordingly be forbidden by the neutral. In maritime war article 8 of the 1907 Hague Convention concerning the

rights and duties of neutral powers in naval war applies and is as follows:

A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war. (1908, Naval War College, International Law Situations, p. 215.)

The principles of this convention would apply to aircraft within neutral jurisdiction.

British-Dutch correspondence, 1916.—In April, 1916, a British seaplane which fell well out in the North Sea was, with its pilot, picked up by a Dutch lugger and taken to a Dutch port. This event gave rise to considerable correspondence between the Governments of the parties concerned. Some of the correspondence stated the official contentions.

A memorandum of the British Foreign Office of May 31, 1916, stated the Government's position quite fully, and is therefore given somewhat at length:

A seaplane belonging to His Majesty's forces was recently obliged on account of engine trouble to descend while over the North Sea. The pilot was rescued by a Dutch fishing boat, which took both him and the seaplane into a Dutch port. The Netherlands Government, though they have released the pilot, appear to consider it their duty to retain the seaplane for the duration of the war. After a careful consideration of the question, His Majesty's Government feel bound to dissent from this view, and believe that the Netherlands Government are under no obligation to intern the machine.

The Netherlands Government, in releasing the pilot, appear to have considered that he was in the same position as a member of a crew of a shipwrecked belligerent warship who is picked up by a neutral merchant vessel and conveyed to a neutral port; such a person, under the rules of The Hague Convention No. 10, of 1907, is entitled to be released. His Majesty's Government believe their decision on this point to be correct and consider

that, while none of the rules expressly laid down by international law exactly fit the case of the seaplane, a further examination of the principles which lie behind the rules which compel neutrals to intern belligerent forces in certain circumstances shows that the seaplane should also be released.

The rules concerning internment are not based on any single and uniform principle. This fact explains itself when one takes into consideration that these rules have grown up gradually and severally and were, before the Peace Conference at The Hague in 1907, customarily agreed upon from different motives. The consequence is that the rules governing internment differ not only with regard to the internment of soldiers on neutral land and internment of warships in neutral harbours, but also with regard to the internment of troops in general, and the internment of such soldiers as have escaped from captivity.

One of the basic reasons for the rules concerning internment is no doubt the fact that a belligerent is entitled to insist that such enemy forces as have crossed neutral territory for the purpose of escaping capture, shall not be enabled to leave the neutral territory, and again resort to hostilities. But this concerns only enemy forces which have deliberately entered neutral territory for the purpose of escaping capture; it cannot apply to such enemy forces as for other purposes cross into neutral territory, or even cross accidentally without knowledge of the neutral frontier. Now, all these must likewise be interned, and the basic reason for their internment is that, in case these troops are not interned, the other belligerent would be justified in crossing into the neutral territory on his part and attacking the enemy there.

As regards the internment of men-of-war, the basic reasons are also manifold. One is—just as in the case of fugitive troops—that a belligerent is entitled to insist that enemy men-of-war which deliberately enter neutral harbours for the purpose of escaping capture, shall not after some length of time be allowed to leave and resort to hostilities again, although they may leave if they only stay twenty-four hours. Other reasons are that a neutral must not allow belligerent men-of-war to make his harbours the base of military operations, the base of supply beyond a certain limit, the base for repairing vital damages, and the like.

Considering that a neutral need not intern soldiers who escape from captivity, that he need not intern such shipwrecked men as have been rescued by neutral merchantmen and brought to neutral ports; that he need not intern such men-of-war as call at neutral

harbours for legitimate purposes; and the like—there is without doubt no general rule in existence which compels a neutral to intern in every case every member of belligerent forces who gets on to its territory, and every man-of-war which comes into its harbours. Each case must be decided according to its merits, and there are different rules for the different cases.

It seems evident that the case of the seaplane which the Netherlands Government is detaining is similar to the case of shipwrecked members of belligerent forces rescued by neutral merchantmen. Whereas, if such shipwrecked men are rescued by a neutral warship, they must be interned according to article 13 of Convention No. 10 of The Hague, 1907, they need not be interned if rescued by neutral merchantmen and brought to neutral harbours.

What are the basic reasons for this difference? That shipwrecked men rescued by neutral men-of-war must be interned is obvious, because these men have been saved from drowning, and perhaps from capture, by getting on neutral territory—a neutral man-of-war is neutral territory—and they can as little be allowed to go back to their own country as members of belligerent forces in land warfare who escaped being captured or killed by crossing into neutral territory. On the other hand, if they are rescued by neutral merchantmen they do not thereby come into neutral territory, for neutral merchantmen are not, as neutral men-of-war are, neutral territory, and any enemy warship may demand that the rescued men be handed over to her. Further, the rescuing neutral merchantmen may as well take the rescued men into a port of their own country as to a neutral port; it is a mere accident if the rescued men are taken into a neutral port instead of into a port of their own country, and for this reason they need not be interned if they are brought into a neutral port.

It may be argued that, in case she does not intern the rescued seaplane, Holland would violate her neutrality and render assistance to Great Britain by allowing the latter to recover a seaplane which were otherwise lost. However, the assistance, if any, rendered by the release of the seaplane would not be greater than the assistance, if any, to a belligerent comprised in the permission, which according to existing law may be given to escaped prisoners of war, and to prisoners brought by troops taking refuge on neutral territory, to leave such territory with the consequence that they will eventually rejoin the armed forces of their country. And why should the release of the British seaplane be an unneutral act, whereas the release of her airman, which has actually taken place, is not? If this airman was allowed to return with

the consequence of eventually joining the British forces again, why should not the same be allowed to his seaplane?

Lastly, it ought to be taken into consideration that none of the enumerated basic reasons for the duty of neutrals to intern belligerent forces can be made use of in favour of internment of the rescued seaplane. The seaplane did not go to Holland for the purpose of escaping capture, or for the purpose of taking in supplies, or for the purpose of undergoing repairs. In fact, it did not get there voluntarily and on its own account, but quite accidentally, because the rescuing merchantman might as well have taken it to an English as to a Dutch port.

It must also be remembered that if the seaplane had been left at sea it might have been salvaged by His Majesty's Government, or by a British ship and taken to a British port. The pilot could speak no Dutch, and the skipper of the fishing boat which rescued him could not speak English, so that the pilot was unable to give any directions or express any wish with regard to the disposal of the seaplane. (Parliamentary Papers, Misc. No. 4 (1918) [Cd. 8983], p. 3.)

Referring to this matter in a communication of July 11, 1916, the Netherlands Minister of Foreign Affairs said:

Your Excellency points out to me that the case of war material salvaged on the high seas is analogous to that of the shipwrecked belligerent combatant. I feel I must, however, point out to your Excellency that the analogy between these two cases is only apparent. International law has defined the treatment of combatants rescued on the high seas by a neutral vessel and disembarked in a neutral port. It has sought to safeguard personal liberty as far as possible, and has established that, only in the case of rescue by a neutral warship (which is considered to form part of the territory of the country) should the shipwrecked person necessarily be interned. This consideration did not arise in the case of material salvaged on the high seas. In the absence of any ruling in this connection, the neutral Governments are then called upon to retain, until the end of the war, material salvaged by a vessel of their nationality, whether warship or merchant-vessel.

It is true that, by leaving at liberty the belligerent combatant brought in by a merchant vessel, the neutral Government enables him to take up arms again, but, just as in the case, quoted by your Excellency, of escaped prisoners of war, regard for personal liberty does not permit of his being interned, unless the rules of international law expressly impose this restriction.

In view of the considerations set forth above, I believe that your Excellency's Government will surely recognise that the Queen's Government, while regretting their inability to accede to the wishes of the British Government, would be acting in contradiction to the principles which have till now guided them in the observation of neutrality were they to restore Sub-Lieutenant Beare's seaplane before the end of the war. (Ibid., p. 6.)

British-Dutch correspondence, 1917.—Later in September, 1917, another British seaplane which came down in open sea was towed with two occupants to a Dutch port. The occupants were released but the seaplane was detained. A note was sent by the British Minister at The Hague to the Dutch Foreign Office in which it was said:

A fresh case has now arisen in the case of a British seaplane, No. 1,232, manned by Flight-Lieutenant Hopcroft and Petty Officer Garner, which came down on the high seas on the 23rd September some 60 miles from the Dutch coast, was rescued by a Dutch fishing vessel, and towed into the Helder, where the machine is now detained, although the occupants have been released in accordance with the accepted tenets of international law.

I would beg to remind your Excellency that it was stated in Sir A. Johnstone's note of the 10th September, 1916, that His Majesty's Government maintains that the rule by which shipwrecked combatants brought into a neutral port by neutral merchant vessels are released applies equally to the case of war material belonging to a belligerent which is brought into a neutral port by a neutral merchant ship. This contention is still maintained by His Majesty's Government, and I have therefore to request that the Netherlands Government will order the release of the airship in question, as well as of that which came down last year with Lieutenant Beare on board.

In the course of a recent conversation, I understood your Excellency to be somewhat doubtful as to whether the decision of the Netherlands Government in the case of such aircraft brought in by a neutral vessel was undeniably good in law, but I gathered that you are of opinion that such a decision once taken cannot be reversed. I would venture with great respect to point out to your Excellency that such an attitude is equivalent to contending that two wrongs can make a right—a contention which I feel sure your Excellency will realise, on reflection, cannot be justifiably maintained as a reason for continuing to

intern aircraft that would appear to be as clearly entitled to release as the officers who manned them.

Your Excellency, in the course of the conversation to which allusion is made above, stated that you had reason to think that the rule applied in the case of these British airships had also been enforced in connection with other belligerent machines. It would be of great interest to my Government to possess details of such instances, and I should therefore be greatly obliged if your Excellency would be so good as to furnish me with the same. (Ibid., p. 12.)

In again declining to accept the British view, the Dutch Minister of Foreign Affairs gave a long argument in the course of which he said:

It goes without saying that if an analogous case concerning one of the adversaries of Great Britain were to arise, for example, if a German dirigible were brought into Holland in similar circumstances, the Queen's Government would in the same way not think of restoring it before the end of the war. I venture to make this apparently superfluous remark in order to show that, if the Queen's Government were to accept the British Government's point of view, they would be obliged in such circumstances to restore those engines of war to the Government to which they belong immediately on their arrival on Netherlands territory. As to ships of war, in view of the special stipulations of international law with regard to them, they can only be subjected to this same treatment in the case of their being found at sea deserted by their crews; if, on the contrary, the crew is still on board, while the ship has sustained damage and is trying to make a neutral port to effect repairs, the Queen's Government will have to decide whether the principle expressed in article 17 of the 13th Convention requires the release of the ship and her crew. (Ibid., p. 16.)

The British Government again renewed its contention in a note of December 21, 1917.

9. The Netherlands Government base their refusal to restore to His Majesty's Government the articles detained on the general ground that there is no precise rule covering the question of their proper treatment, and that their restoration would be an act reinforcing the armed strength of a belligerent, and therefore contrary to neutrality. The argument is supported, in the eyes of the Netherlands Government, by article 6 of the 13th Hague Convention, which forbids the direct or indirect

supply of war material by a neutral Government to a belligerent. It is contended that the liberation of the crews of the seaplanes referred to above was prescribed by a definite rule of international law overriding the general prohibition against strengthening a belligerent's military strength; this rule cannot, according to the Netherlands Government, be applied by analogy to the articles rescued at the same time or in similar circumstances, because the general prohibition which they conceive to necessitate the action which they have taken must hold good unless explicitly overridden.

10. In all the cases enumerated above, with the exception of the seaplane rescued by the Norwegian steamship *Orn*, Dutch subjects have—so far as is known, unasked—taken possession of the property of His Majesty's Government on the high seas and carried it into Netherlands jurisdiction. On requesting the restoration of the property thus gratuitously taken from them, His Majesty's Government are met with the excuse that to release the articles would be to add to the armed strength of Great Britain, and would therefore be contrary to the neutrality of the Netherlands. The practical effect of such a ruling is that Dutch seamen who, from motives of humanity, rescue wrecked British airmen and their machines, become—no doubt entirely contrary to their wishes or their expectations—instrumental in diminishing the armed strength of Great Britain. In the worst case noted (that in which a machine-gun and other gear was removed from a seaplane by the crew of the *Noord-Hinder* lightship, who were Netherlands Government servants), it is difficult to perceive much difference between such conduct and the misappropriation of goods which becomes the subject of criminal proceedings. Yet the restoration of the articles thus taken is refused on the ground of neutrality.

11. The Netherlands Government contend that, if it were not for the existence of an express provision of international law overriding the general rule, they would be obliged by the prohibition against adding to the armed strength of a belligerent to intern the crews of belligerent warships or aircraft rescued and brought to the Netherlands by neutral merchant ships. It must be remarked that, if this general prohibition really had the effect pretended, it could scarcely be overridden without a definite regulation laying down in terms that such crews were not to be interned. No such positive regulation exists. The rule under which persons in the above position are released is merely mentioned, as it were in passing, in the report of the Drafting Committee on The Hague Convention for the adaptation of the principles of the Geneva Convention to Maritime Warfare. It is evident that it is

not a rule overriding a wider principle, but is one recognised as flowing naturally from the general principles which govern the question of the internment of belligerent persons and war material by neutral Powers. Those general principles apply equally to persons and to material by analogous circumstances, and this fact is not altered by the chance that the case of combatants rescued by neutral merchant ships is mentioned in the report on the 10th Hague Convention, while no allusion to the case of material in a similar position occurs in an equally authoritative document.

12. As regards the reference made by the Netherlands Government to the terms of article 6 of the 13th Hague Convention, His Majesty's Government can only express astonishment at being asked to consider such an argument. The article refers to the supply by a neutral to a belligerent Power of war material owned by the neutral, and has no wider scope. Furthermore, it must be observed that the seaplanes and other articles now in question would never have come into the possession of the Netherlands Government at all if they had been left alone by the Dutch subjects who brought them into the Netherlands ports. There could have been no question of the Government furnishing any of the articles to His Majesty's Government had they simply refrained from impounding goods which no rule of international law required them to seize.

13. I request that you will address a note in the above sense to the Netherlands Minister for Foreign Affairs, stating that His Majesty's Government is unable to perceive any force in the arguments by which he seeks to defend the action of his Government, and at the same time reiterate the request for the release and return of the articles in question. (Ibid., p. 17.)

Some of this correspondence shows the effect of the strain of war in an attempt to obtain from a neutral all possible concessions in the way of favorable treatment on the one hand and of an attempt to avoid all possible complications to which a neutral might be exposed on the other. Possibly the hope of salvage money may also stimulate a private neutral vessel to bring in a disabled aircraft found on the sea.

Transformation of civil aircraft.—In 1919 the Supreme Council of the Peace Conference proposed to the Aeronautical Commission among others the following question: "Can civil aeroplanes and airships be easily transformed into weapons of war?" The aeronautical

commission made up of technical representatives from the United States, the British Empire, France, Italy, Japan, Belgium, Brazil, Cuba, Greece, Portugal, Rumania and Serb-Croat-Slovene States, after consideration, replied unanimously, "Yes, commercial aeroplanes and airships can be very easily and quickly transformed into weapons of war."

General principles, 1919.—The degrees to which the principles of regulation of aviation had advanced is evident in the discussions preliminary to the negotiation of the treaty of peace and the convention relating to international air navigation in 1919. On April 7, 1919, the following was approved by the Aeronautical Commission:

LIST OF PRINCIPLES SETTLED BY THE COMMISSION FOR THE PURPOSE
OF GUIDING THE SUBCOMMITTEES IN THEIR WORK

1. *Recognition*—

(1) Of the principle of the full and absolute sovereignty of each State over the air above its territories and territorial waters, carrying with it the right of exclusion of foreign aircraft:

(2) Of the right of each State to impose its jurisdiction over the air above its territory and territorial waters.

2. Subject to the principle of sovereignty, recognition of the desirability of the greatest freedom of international air navigation in so far as this freedom is consistent with the security of the State, with the enforcement of reasonable regulations relative to the admission of aircraft of the contracting States and with the domestic legislation of the State.

3. With regard to domestic regulations relative to the admission and treatment of the aircraft of the contracting States, recognition of the principle of the absence of all discrimination on the ground of nationality.

4. The recognition of the principle that every aircraft must possess the nationality of one contracting State only and that every aircraft must be entered upon the register of the contracting State the nationality of which it possesses.

5. The following provisions are recognized as desirable from an international point of view to insure the safe conduct of aerial navigation:

(i) Regulations for compulsory certificates of airworthiness and licenses for wireless equipment, at least for aircraft used

for commercial purposes. Mutual recognition of these certificates and licenses by the contracting States.

(ii) Regulations for compulsory licenses of pilots and other personnel in charge of aircraft. Mutual recognition of these licenses by the contracting States.

(iii) International rules of the air, including international rules as to signals, lights, and for the prevention of collisions. Regulations for landing and on the ground.

6. Recognition of the principle of special treatment for military, naval, and State aircraft when they are in Government Service.

7. Recognition of the right of transit without landing for international traffic between two points outside the territory of a contracting State, subject to the right of the State traversed to reserve to itself its own internal commercial aerial traffic and to compel landing of any aircraft flying over it by means of appropriate signals.

8. Recognition of the right of use, by the aircraft of all the contracting States, of all public aerodromes upon the principle that charges for landing facilities should be imposed without discrimination on the ground of nationality.

9. Recognition of the principle of mutual indemnity between the contracting States to cover damage done to person or property in one State by Government aircraft of another State.

10. Recognition of the necessity of a permanent International Aeronautical Commission.

11. Recognition of the obligation of each contracting State to give effect to the provisions of the convention by its domestic legislation.

12. Recognition of the principle that the convention does not affect the rights and duties of belligerents or neutrals in time of war. (Commission de l'Aéronautique, p. 18.)

Questions in House of Commons.—Some of the rescues of the crews of submarines gave rise to questions in regard to their treatment by neutrals. In the House of Commons, January 13, 1916:

Mr. Swift MacNeill asked the Secretary of State for Foreign Affairs whether the crew of the British submarine which sank off Texel on the 6th instant, having sprung a leak and grounded, who were rescued by a Dutch cruiser and brought into Helder, have been interned at Groningen by the Dutch Government; whether, having regard to the fact that the British submarine whose crew were thus rescued was not sunk by a belligerent, the detention or internment of that crew by the Dutch Government

is contrary to the principles and practice of international law; whether Article 13 of Convention X, of the Second Peace Conference, providing that if shipwrecked sailors are taken on board a neutral man-of-war precaution must be taken so far as possible that they do not again take part in the operations of the war, applies only to sailors whose ships have been wrecked by the enemy, not to sailors whose ships have been wrecked in the ordinary course of navigation; and whether Great Britain will demand the immediate release from detention of these sailors, whose case does not differ from that of any other British subjects in neutral territory, and who should, even if their ship had been disabled by a belligerent, as in the case of the Russian sailors rescued by British, French, and Italian cruisers from ships disabled by the Japanese, be not detained but handed over to Great Britain on the condition that they should not take part in hostilities during the War?

Sir E. GREY. The crew of the *E 17* has been interned by the Dutch Government, but the place of internment is as yet unknown to His Majesty's Government.

The answer to the second part of the question is that Article 13 of Convention X of The Hague draws no distinction between ships wrecked by the enemy or in the ordinary course of navigation. As to the remainder of the hon. Member's question, I will see that the suggestions and arguments put forward by him are very carefully considered. (Parliamentary Debates, Commons, 1915-1916, Vol. LXXVII, p. 1743.)

Repairing in neutral port.—Authorities are bound in general by the obligation to use due diligence that the port shall not become a base, and by previous principles and practice of Great Britain. This obligation to use due diligence is embodied in the provisions of the treaty of Washington, 1871, which states, in Article VI:

A neutral Government is bound—

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

After 1871 these principles were generally approved.

In 1907 at The Hague Conference, Great Britain proposed as a basis for a rule:

A neutral State must not knowingly permit a warship of a belligerent to repair within its jurisdiction the injuries resulting from a combat with the enemy, nor in any case to make repairs in excess of what will be necessary for navigating.

Japan made a similar proposal.

After much discussion a provision in regard to repairs was embodied as article 17 of the Thirteenth Convention on Neutral Rights and Duties in Maritime War, as follows:

In neutral ports and roadsteads belligerent warships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force. The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay.

The British, while objecting to some articles of this convention, regarded this article 17 as a fair statement of the existing law.

The "Glasgow," 1914.—In the Battle of Coronel between the British and German fleets off the west coast of Chile on November 1, 1914, two British vessels were sunk and others were damaged. The cruiser *Glasgow* was reported to have received five holes from German shell fire. The *Glasgow* steamed under orders away from the area of battle, passed through the Straits of Magellan, and on November 20, was reported as repairing at Rio de Janeiro.

THE "GLASGOW" AT RIO
REPORTED SHARE IN ACTION OFF CHILE
(From our correspondent)

NEW YORK, Nov. 20.

The Brazilian Government has given permission for the British cruiser *Glasgow* to enter the dry dock at Rio de Janeiro to make urgent repairs. The *Glasgow*, according to dispatches published in the American Press, has five holes in her hull from shell fire. Four of her crew were wounded in the battle off Chile.

Officers of the *Glasgow* are quoted as saying that at the outset of the battle Admiral Cradock from the flagship *Good Hope*, ordered the *Glasgow* and *Otranto*, in view of the higher power of the German squadron's guns, to seek a place of refuge. Notwithstanding this order the *Glasgow* answered the German fire. In the first few minutes of the fight, the officers of the *Glasgow* are stated to have said the *Good Hope* had one of her two 9-2 in. guns dismantled and her magazine exploded. Admiral Cradock and the crews of the *Good Hope* and *Monmouth*, it is believed, went down with their ships. The battleship *Canopus*, according to the story attributed to the officers of the *Glasgow*, steaming only 16 knots, could not arrive in time to participate in the fight.

The Brazilian Government has given the *Glasgow* seven days in which to make the necessary repairs. (London Times, Nov. 21, 1914.)

Later, the *Glasgow* took part in the battle off the Falkland Islands, December 8, 1914.

The "Geier" and the "Locksun."—On October 28, 1914, the British ambassador raised the question of detaining the *Geier*, a vessel or war of Germany, and the *Locksun*, a vessel belonging to the North German Lloyd Co., which had entered the port of Honolulu. On the same date, the Japanese ambassador raised the question in regard to the intentions of the United States in regard to the *Geier*.

On the same day, the Secretary of State received from the Treasury Department a report from the Collector of Customs at Honolulu, as follows:

HONOLULU, Oct. 27, 1914—10.15 p. m.

On October 15 captain German gunboat *Geier* requested permission to make repairs to render vessel seaworthy and estimated time for same at one week. On October 20 Naval Constructor Furer, at my request, examined the vessel and recommended that time be extended eight days from 20th to place boilers in seaworthy condition. To-day consul requests from eight to ten days more in which to make repairs to steam and feed piping and boilers that have been found to be leaking. Consul states captain has used every effort to finish repairs, working Sundays and overtime, but owing to lack of labor can not finish in less time. Naval Constructor Furer has just completed another examination of the vessel and reports that he is unable to state how long repairs should take, as more leaky tubes may be found as work progresses. Honolulu iron works estimates time for repairs at from two to three weeks, which, in opinion of Furer, is a conservative minimum. Furer reports piping and boilers in bad condition; may possibly take further time to repair. Await instructions. (American Journal International Law, 1915, Spec. Sup. 9, p. 242.)

On October 30, 1914, the Counselor of the Department of State sent the following to the German ambassador in regard to the *Geier*:

DEPARTMENT OF STATE,
Washington, October 30, 1914.

My Dear Mr. Ambassador: The Department has been advised that the German gunboat *Geier* put into the port of Honolulu, and on October 15 the captain requested permission to make repairs to render the vessel seaworthy, and estimated the time for this work to be one week. The naval constructor of the United States at the port of Honolulu examined the vessel on October 20, and recommended that the time be extended eight days, from October 20, in order to place the boilers in a seaworthy condition. On October 27, the German consul at that port requested from eight to ten days additional time in which to make repairs to steam and feed piping and boilers that have been found to be in a leaking condition. Upon a further examination, the United States naval constructor reports that he is unable to state how long repairs should take, as conditions requiring remedy may be found as work progresses. It is also reported that, on account of the generally bad condition of the piping and boilers, further time may be required to complete all repairs.

The circumstances in this case point to the gunboat *Geier* as a ship that at the outbreak of war finds itself in a more or less broken-down condition and on the point of undergoing general repairs, but still able to keep the sea. In this situation the Government believes that it does not comport with a strict neutrality or a fair interpretation of the Hague Conventions, to allow such a vessel to complete unlimited repairs in a United States port. The Government therefore has instructed the authorities to notify the captain of the *Geier* that three weeks from October 15 will be allowed the *Geier* for repairs, and that if she is not able to leave American waters by November 6, the United States will feel obliged to insist that she be interned until the expiration of the war. (American Journal International Law, 1915, Spec. Sup. 9, p. 243.)

Later, a communication was sent in regard to the *Locksun*:

DEPARTMENT OF STATE,
Washington, November 7, 1914.

My Dear Mr. Ambassador: Referring to my previous communication to you of October 30 regarding the internment of the German cruiser *Geier*, the Department is now in possession of information that the German steamship *Locksun*, belonging to the Norddeutscher Lloyd Company, cleared August 16, 1914, from Manila with 3,215 tons of coal for Menado, in the Celebes; that she coaled the German warship *Geier* in the course of her voyage toward Honolulu, where she arrived soon after the *Geier*; that the *Locksun* received coal by transfer from another vessel somewhere between Manila and Honolulu, and that the captain stated that he had on board 245 or 250 tons of coal when he entered Honolulu, whereas investigation showed that he had on board approximately 1,600 tons.

From these facts the Department is of the opinion that the operations of the *Locksun* constitute her a tender to the *Geier*, and that she may be reasonably so considered at the present time. This Government is, therefore, under the necessity of according the *Locksun* the same treatment as the *Geier*, and has taken steps to have the vessel interned at Honolulu if she does not leave immediately. (American Journal of International Law, 1915, Spec. Sup. 9, p. 245.)

To this action the German ambassador took exception, and later the Secretary of State replied:

In the circumstances of this case, as known by the Department, it is obliged to state that it still adheres to its previous position that the status of the *Locksun* as a tender to the ship of war

Geier was sufficiently proved to justify her treatment as such. In this connection the Department has the honor to call to your attention the following quotation from the award of the Alabama Claims Commission, which seems to establish this principle regarding the treatment of tenders, although the application of this statement was not made to the exact circumstances of the *Locksun* case:

"And so far as relates to the vessels called the *Tuscaloosa* (tender to the *Alabama*), the *Clarence*, the *Tacony*, and the *Archer* (tenders to the *Florida*), the tribunal is unanimously of opinion that such tenders or auxiliary vessels, being properly regarded as accessories, must necessarily follow the lot of their principals and be submitted to the same decision which applies to them respectively."

The entire practice of the internment of vessels appears to be of recent origin. The doctrine of internment was apparently first applied to any great extent during the Russo-Japanese war, and it is believed that the treatment of the *Locksun* is in keeping with the high standard of neutrality upon which the doctrine of internment is based. The Department is not aware that measures to preserve neutrality are entirely dictated by precedent and international law, and it believes that belligerents hardly have proper cause to question an attitude on neutrality justly in advance of precedent and international law if it is applied by the neutral impartially to all belligerents. As to the advisability of assuming such an attitude, the Department is impressed with the proposition that the neutral and not the belligerent is the proper judge in the circumstances. (American Journal International Law, 1915, Spec. Sup. 9, p. 251.)

Spaight's opinion.—J. M. Spaight, who has written much upon various phases of air law, says particularly of the situation at the end of the World War regarding belligerent aircraft salvaged by neutral private vessels:

The law upon the point—indeed, upon the whole question of belligerent air entry—was unsettled, but a rule was being created by practice, and to allow exceptions from it was unwise. Save when allocated to, and in contact with, a warship, which, itself for some purposes the "territory" of its State, may be regarded as imparting its own character to an aircraft carried upon it or lashed to it, belligerent military aircraft brought into neutral jurisdiction under whatever circumstances should, it is submitted, be subject to the one universal and inelastic rule that they must be detained by the neutral authorities. Relax that

rule and the door opens to a host of possible exceptions and complications. (Spaight, *Air Power and War Rights*, p. 438.)

[*Internment.*—In general, aircraft and their personnel entering neutral jurisdiction during the World War were interned. This was the case whether the aircraft entered in distress or flew within neutral jurisdiction. Sometimes aircraft flying within neutral jurisdiction were brought down by gunfire as was the case in Switzerland and the Netherlands. It made no difference even if an aircraft entered neutral jurisdiction in error supposing it was still in belligerent territory. Sometimes notification was given by signal, rocket, or in some other manner, but absence of notification was not a ground for exemption from liability.

There is no reason why belligerent aircraft should, within neutral jurisdiction, receive any more favorable treatment than that extended to naval craft, and as the risks following entrance are greater, the accepted doctrine is that belligerent military aircraft may not enter neutral jurisdiction and the rules proposed by the commission of jurists at The Hague in 1923 imposed duties upon the neutral.

Article 42. A neutral Government must use the means at its disposal to prevent the entry within its jurisdiction of belligerent military aircraft and to compel them to alight if they have entered such jurisdiction.

A neutral Government shall use the means at its disposal to intern any belligerent military aircraft which is within its jurisdiction after having alighted, for any reason whatsoever, together with its crew and the passengers, if any, (1924, *Naval War College, International Law Documents*, p. 133.)

The commission of jurists in 1923 referred to article 15 of the 1907 Hague Convention for the Adaptation to Naval War of the Principles of the Geneva Convention which provided that—

The shipwrecked, sick, or wounded, who are landed at a neutral port with the consent of the local authorities, must, unless an arrangement is made to the contrary between the neutral State

and the belligerent States, be guarded by the neutral State so as to prevent them again taking part in the operations of the War.

The expenses of tending them in hospital and interning them shall be borne by the State to which the shipwrecked, sick, or wounded persons belong. (1908, Naval War College, International Law Situations, p. 207.)

The proposed rules in 1923 extended this principle of internment to persons brought in upon a neutral military aircraft in article 43 as follows:

The personnel of a disabled belligerent military aircraft rescued outside neutral waters brought into the jurisdiction of a neutral State by a neutral military aircraft and there landed shall be interned. (1924, Naval War College, International Law Documents, p. 134.)

Practice in the World War was to release airmen rescued by nonmilitary craft whether air or marine when the airmen were brought within neutral jurisdiction. Whether belligerent airmen rescued by public neutral nonmilitary craft should be released is still somewhat uncertain but as the public neutral craft, e. g. a royal neutral yacht, would be exempt from visit and search, it would seem that rescued airmen should be liable to the same treatment when entering the neutral port as when rescued by a neutral vessel of war. The rescue of airmen and aircraft by neutral private vessels during the World War seems to have been followed by release of airmen and internment of the aircraft.

Seaplane rescue and repairs.—It is generally admitted that a neutral should conduct itself in a humane manner toward belligerents and that such conduct toward one belligerent can not be regarded by the other as unfriendly. The seaplane when upon the surface of the water is according to the decisions of courts to be treated as a seacraft would be treated and incurs the same liabilities. The shipwrecked personnel of a belligerent vessel of war rescued by a neutral are to be treated according to the provisions of article 15 of the Convention for the Adaptation to Naval War of the Principles of the Geneva Convention.

While a naval vessel which is within a harbor in which 24-hour sojourn is permitted, may within the period make repairs necessary to render the vessel seaworthy if it enters under its own power, if the neutral brought the disabled vessel in from the high sea, the vessel should be interned. This principle should be applied even more strictly to a seaplane. The Commission of Jurists in 1923 in its report proposing article 42 said:

The obligation on the part of the neutral Power to intern covers not only the aircraft, but its equipment and contents. The obligation is not affected by the circumstances which led to the military aircraft coming within the jurisdiction. It applies whether the belligerent aircraft entered neutral jurisdiction, voluntary or involuntarily, and whatever the cause. It is an obligation owed to the opposing belligerent and is based upon the fact that the aircraft has come into an area where it is not subject to attack by its opponent.

The only exceptions to the obligation to intern an aircraft are those arising under articles 17 and 41. The first relates to flying ambulances. Under the second, an aircraft on board a warship is deemed to be part of her, and therefore will follow the fate of that warship if she enters neutral ports or waters. If she enters under circumstances which render her immune from internment, such aircraft will likewise escape internment.

The obligation to intern belligerent military aircraft entering neutral jurisdiction entails also the obligation to intern the personnel. These will in general be combatant members of the belligerent fighting forces, but experience has already shown that in time of war military aeroplanes are employed for transporting passengers. As it may safely be assumed that in time of war a passenger would not be carried on a belligerent military aircraft unless his journey was a matter of importance to the Government, it seems reasonable also to comprise such passengers in the category of persons to be interned. (1924, Naval War College, International Law Documents, p. 133.)

SOLUTION

(a) The government of State Z should deny the request of the commander of the dirigible of the air forces of State X to replace the hydrogen by helium.

(b) The government of State Z should intern the seaplane and its personnel.

SITUATION II

NEUTRALITY AND TERRITORIAL WATERS

States X and Y are at war. Other states are neutral. State R has forbidden submarines to enter its territorial waters, except in case of distress; or to pass through its straits and archipelagoes, except on the surface and under the condition that no belligerent activities take place within such areas.

(a) An air reconnaissance is being maintained ahead of a part of the fleet of X, which, in passing through a strait, between an islet and State R, 6 miles wide at either entrance but wider in the middle, sights on the surface a submarine of Y on the landward side of the islet, but $3\frac{1}{2}$ miles from land in a favorable position to attack the vessels of X. (1) Should the aircraft attack the submarine? (2) Would the situation be changed if a cruiser of State R is near?

(b) The land of R consists of large islands, separated by wide channels or sounds whose shores are all under the jurisdiction of R. These channels or sounds contain numerous relatively small islands, islets, and barrier reefs, inclosing, in places, large areas of navigable waters. Some of the entrances are narrow and navigable. Some are wide, and not safely navigable due to sand bars, reefs, and shoals.

At a point 7 miles from any land of R, the vessels of X refuel from a commercial tanker of State X. From this area the only navigable channels are between islands belonging to R not more than 6 miles apart. An aircraft of Y sees this refueling and demands that all the vessels concerned be interned.

What action should be taken?

SOLUTION

(a) (1) The aircraft of X should not attack the submarine of Y unless on grounds other than mere presence of the submarine in the strait of R.

(2) The presence of the cruiser of State R would make it more imperative that any attack by the aircraft of X upon the submarine of Y should be based upon some hostile act of the submarine of Y.

(b) State R should intern the vessels of State X if they are or have been using the waters of R as a base.

Historical bays.—During the seventeenth century there were many differences of opinion upon the subject of the limits of maritime jurisdiction. Extreme claims were made by some states and denied by others. The claims later made by the United States were not always consistent, save that a minimum of 3 miles has always been maintained.

States have, however, generally maintained that jurisdiction beyond the 3-mile limit might be exercised for specific purposes as fishing, revenue purposes, etc.

Admiral Sperry's attitude, 1907.—Admiral Sperry, a former president of this Naval War College, and delegate plenipotentiary to the Second Hague Peace Conference in 1907 as member of the committee of examination upon the convention on the laying of automatic contact mines, when the question of the extent of territorial waters within which mines might be laid was under consideration, explained that the American proposal had avoided mentioning any limit on area. He said:

The omission in the proposal of the delegation of the United States of America relative to submarine mines of a definite restriction on the places where they may be laid is not due to any sympathy whatever with the general use of mines beyond territorial waters, a means which in common with the whole civilized world it condemns, but for quite other considerations.

The term territorial waters is perhaps no more certain in its application than measured limits; but the naval delegate of the United States is not prepared to say that a limitation in one way

or another would not affect the right to defend the 4,000 miles of continental coast of the United States at certain points which must be approached through a winding channel between submerged reefs, far from the shore, where some mines would absolutely prevent access. In one island of the Philippines that is surrounded by reefs there is a large bay with land on all sides, which would shelter the fleet of the greatest Power.

The Powers that are here represented have vast rich possessions in the Pacific and Indian Oceans, where the harbours and islands are protected by coral reef barriers, with only here and there a passage that may or may not be less than 10 or even a hundred miles from the mainland.

The reefs may or may not be exposed at low tide. Where is the low-water mark? Has it been decided that all waters inside of reefs are territorial waters? Shall the 3 miles be measured from the reefs and beyond? The coast of Australia is fringed for more than a thousand miles by the Great Barrier Reef at a distance of from 20 to 150 miles from the shore. Inside this reef, where there is only an occasional passage, there exists a labyrinth of lesser reefs and islets, but in the thousand miles the largest vessels can navigate in security under the guidance of a pilot. It is not necessary for a ship going to an Australian port to pass inside, and the interior waters can hardly be considered as forming a part of the high seas. It is not within the knowledge of the delegate of the United States whether they are so considered; but it seems doubtful that the nationals of that great and rich community would voluntarily abandon what might be almost a perfect defence of important points.

Many Powers represented here have vast colonial empires whose coasts are protected by almost perfect ramparts of coral, as all naval officers know, and it would be well to consider with care the possible effects of any conventional provision that we might agree upon, and that when once made would be difficult to denounce. (Reports to The Hague Conferences of 1899 and 1907, 1917, pp. 664-665.)

The committee of examination adhered to the 3-mile limit but the commission omitted the articles which referred to limits of area and these articles were not inserted in the convention.

Cuba.—Around some parts of Cuba there are reefs, rocks, and keys and about the middle of the nineteenth century Spain made claims to extended jurisdiction

along the Cuban coast. These claims gave rise to much correspondence between the United States and Spain.

Secretary Seward in 1863 referring to the Spanish claim of a 6-mile coast jurisdiction and the argument based on the nature of the outlying islets, etc., said:

This ground is, that the shore of Cuba is, by reason of its islets and smaller rocks, such as to require that the maritime jurisdiction of Cuba, in order to purposes of effective defense, and police, should be extended to the breadth of 6 miles. The undersigned has examined what are supposed to be accurate charts of the coast of Cuba, and if he is not misled by some error of the chart, or of the process of examination, he has ascertained that nearly half of the coast of Cuba is practically free from reefs, rocks, and keys, and that the seas adjacent to that part of the island which includes the great harbors of Cabanos, Havana, Matanzas, and Santiago are very deep, while in fact the greatest depth of the passage between Cuba and Florida is found within 5 miles of the coast of Cuba, off the harbor of Havana.

The undersigned has further ascertained, as he thinks, that the line of keys which confront other portions of the Cuban coast resemble, in dimensions, constitution and vicinity to the mainland, the keys which lie off the southern Florida coast of the United States. The undersigned assumes that this line of keys is properly to be regarded as the exterior coast line, and that the inland jurisdiction ceases there, while the maritime jurisdiction of Spain begins from the exterior sea front of those keys.

In view of the considerations and facts which have been thus presented, the undersigned is obliged to state that the Government of the United States is not prepared to admit that the jurisdiction of Spain in the waters which surround the island of Cuba lawfully and rightly extends beyond the customary limit of 3 miles. (1 Moore, *International Law Digest*, p. 711.)

In 1869, Secretary Fish in a note to the Secretary of the Navy said:

The maritime jurisdiction of Spain may be acknowledged to extend not only to a marine league beyond the coast of Cuba itself, but also to the same distance from the coast line of the several islets or keys with which Cuba itself is surrounded. Any acts of Spanish authority within that line can not be called into question, provided they shall not be at variance with law or treaties. (*Ibid.*, p. 713.)

The Spanish claim to a 6-mile jurisdiction around the coast of Cuba was involved in the discussion in 1864 between the British chargé and Mr. Seward as to an international agreement for a 6-mile limit but no action was taken.

Sweden.—The coast of Sweden both within its former and present limits has given rise to many questions of jurisdiction. The islands off the Swedish coast inclose waters of varying widths. Whether the waters landward of some of these coast islands or inclosed by some of these islands should be regarded as closed sea has been a matter of difference of opinion. Swedish legislation has sometimes referred to certain of these islands as archipelagoes bounding closed seas. The decree of December 20, 1912, speaking of Swedish inner territorial waters referred to waters between or within islands, islets, or reefs not continually submerged. Manifestly this is not sufficiently explicit for all cases which may arise off the coast of Sweden as some islands are a long distance from the coast, but the purpose of the legislation seemed to be roughly to assimilate the jurisdiction over waters within archipelagoes to waters within bays.

Scandinavian decrees.—Denmark, Norway, and Sweden agreed upon rules for neutrality in 1912 (1917, Naval War College, International Law Documents, p. 183) and provided that changes of the rules should be made only after sufficient notice to permit an exchange of views on the matter.

A Swedish decree of July 19, 1916, provided that—

Submarines belonging to foreign powers and equipped for use in warfare may not navigate or lie in Swedish territorial waters within 3 nautical minutes (5,556 meters) from land or from extreme outlying skerries, which are not continuously washed over by the sea, under peril of being attacked by armed force without previous warning; exception is, however, made for the passage through Oresund between parallels of latitude drawn in the north, through Viking Light (lat., north 56° 8' 7''), and, in the south, through Klagshamm Light (lat., north 55° 31' 2'').

In the event of a submarine being compelled through bad weather or shipwreck to enter the forbidden area, the above regulation is not applicable, always provided that the vessel while within the mentioned area, shall remain above the surface and fly its national flag as well as the international signal indicating the cause of its presence. The vessel shall leave the area as soon as possible after the reason for its presence there has ceased to exist. (Ibid., p. 215.)

The British authorities saw in this Swedish decree an evidence of a marked difference in the attitude adopted "towards the two belligerent parties and this difference seems incompatible with the obligations of a true and impartial neutrality." (Parliamentary Papers, Misc. No. 8 (1917), p. 3.) The Swedish authorities resented this imputation saying "every submarine is treated as a belligerent submarine unless its employment for commercial purposes is definitely proved by known facts." (Ibid., p. 4.) Further notes were exchanged as was customary at this period of the war.

Instructions and regulations prior to 1914.—Before the World War instructions, regulations, and decrees had been issued in regard to the use of territorial waters and aerial space. France by decree of October 19, 1912, provided for the application of XIII Hague Convention of 1907 that the territorial waters of France may be considered to extend 6 miles from the low-water mark as a zone of neutrality and the Minister of Marine on December 19, 1912, stated that territorial waters of neutrals should never be considered to extend less than 3 miles from the coast or islands or reefs dependent on the coasts. Italy by a decree of August 20, 1909, announced that in case of war it would establish a 10-mile neutrality zone. Other decrees and proclamations contained varying provisions as to maritime jurisdiction.

Norwegian territorial waters.—By a royal decree of June 29, 1911, a commission of three was named to make an investigation in regard to the maritime frontier of Finmarken. In its report the commission referred to

the letters patent of February 25, 1812, in which the king had said:

Nous voulons avoir stipulé comme règle dans tous les cas où il est question de délimitation de la frontière de notre souveraineté sur les eaux territoriales, que celle-ci doit être comptée jusqu'à la distance d'une lieue marine ordinaire de l'île ou l'îlot le plus éloigné de la terre qui n'est pas recouvert par la mer. (Rapport du 29 Fevrier 1912 de la Commission da la Frontiere Des Eaux Territoriales. Pt. I, 1912, p. 3.)

Norway also enacted many laws regulating fisheries within a league of the coast or coastal lands covered by the sea.

* * * sur les mers baignant les côtes des deux provinces jusqu'à la distance d'une lieue géographique de la terre, à compter de l'île ou l'îlot le plus éloigné que ne soit pas recouvert par la mer; (Ibid., p. 3.)

This regulation of the distance had existed long before the union of Norway and Sweden, and in earlier days during the union with Denmark wider areas had also been claimed. Such claims had also been made at other times.

The waters along the coast and about the islands of Norway afford examples of the varied geographical configurations and conditions but the expression determining the limit of territorial jurisdiction was often "a league from the coast reckoned from an island or islet which is most remote and not covered by the sea." While there was not much difficulty in identifying island, islet, and rock, there was some difficulty in interpreting "qui ne sont pas recouverts par le mer". Questions arose as to whether this should be interpreted as exposed at high tide, exposed at low tide, at mean low tide, or sometimes exposed. The drift of opinion seems to have been for Scandinavian coasts that any rock or reef not constantly submerged would be regarded as the territory of the state from which the limit of territorial waters should be measured.

In 1919 the United States Government issued a volume entitled "The Extent of the Marginal Sea" pre-

pared by Henry G. Crocker. This volume contained a translation of some of the Report of the Norwegian Commission, in part as follows:

In the opinion of the present Commission, the terms of the letters patent admit of only one certain solution, which is that rocks which are always under water must not be taken into consideration in any case. But the words in themselves may mean "which are never under water," "which are not usually under water," "which are not generally under water," "which are not continually under water," "which are not under water all the time," and according to any of these and many other interpretations; they may be used in the sense of high and low tide, at ordinary times or at the time of spring tides, or in the sense of the mean sea level so as to include or exclude rocks of a totally different character from those that are under water at high tide at the time of spring tides to those which at such times are above water at low tide.

There being no indication in the wording of the text itself, the most equitable method is for the Commission to draw its own conclusions based upon the following considerations: the rescript of June 18, 1745, where the term "shoals" (*hauts-fonds*) appears alongside of the term "rocks," leads to the belief that the boundary line is to be measured from the rocks which are not continually under water, and subsequent rescripts certainly did not have in view any modification in this respect; construed in this way, the different rescripts relating to the *one league* boundary line lay the minimum of restriction upon the old claim of a more extensive boundary. If the expressions used in the letters patent, which came later, are equivocal, they must preferably be given the meaning which agrees with the old right, and the words "which are not under water" must be interpreted as excluding rocks which are always under water. * * *

It may be asked whether we should take into consideration any rock at all, whatever its distance from shore and place the boundary line of our territorial waters *one league* beyond it. The letters patent lay down no restrictions, neither can an order of this nature—it does not attempt to trace the boundary line in all its details along the coast—undertake to give exact indications on this subject.

It would seem, however, to be equitable to take into account, in any event, rocks that are not more than *two geographical leagues* distant. If a circle with a *one league* radius be drawn around such a rock (the width fixed upon for the territorial sea), this circle will touch a line drawn the same distance from the coast.

It may also happen—and this is indeed the case with our country—that there are certain rocks strung out from shore and so closely connected therewith that the boundary line must manifestly be placed *one league* beyond the farthest out, as the letters patent provide.

If there is an isolated rock at a greater distance than *two leagues* from land, its importance must of course be determined according to the circumstances.

If it should be necessary to lay down in principle what rocks along the coast are to be considered as “the farthest out,” the method most in conformity with the terms of the letters patent of 1812—which make the boundary line pass beyond the most distant islands and islets and do not even mention the coast line of the mainland—would be to consider as Norwegian the entire area of the sea between these rocks and the shore and to extend the boundary line of the territorial waters *one league* beyond the straight lines drawn from rock to rock. If the provision of the law gives any indication, it would seem to be that its intention is to consider the islands and islets as so many connecting points of the basic lines. In this way we obviate in general the necessity of drawing the boundary line in the shape of an arc beyond the rocks (or in the shape of semicircles around them with a one league radius), as well as of drawing a complete circle around a particular rock which is given a parcel of territorial sea separate from the rest of the zone.

How far apart, however, should two of “the most distant” rocks be to admit of the drawing of such a connecting line, from which the boundary of the territorial waters shall be measured? Lines should be drawn, at any rate between rocks that are not more than *two leagues apart*; but it will be necessary to consider the particular circumstances in each instance.

We must pursue the same course when it is a question of determining the boundary line off the coast where the “skjaergaard” begins and where the coast assumes the character of a fjord at whose entrance there are rocks.

The various circumstances to be taken into consideration in each particular instance may be of a historical, an economic or a geographical nature; for example, a time-honored conception with regard to the boundary, and undisturbed possession of fisheries carried on by the population along the coast since time immemorial and necessary to its existence; the practical advantages of a line easy to ascertain on the spot; the natural boundaries of fishing banks. (Crocker, *The Extent of the Marginal Sea*. 1919, pp. 613–616.)

Differing neutrality rules.—Neutrality proclamations are not uniform. One state may even prescribe more stringent regulations for one part of its dominions than for another part. The geography and other conditions may influence the character of the regulations, i. e., a state may prescribe certain regulations for its mainland while making different regulations for its remote dependencies. The Netherlands announced in 1914 more stringent regulations for entrance to its continental territorial waters by belligerent vessels of war than for such entrance to the waters of its oversea possessions.

Owing to the comparatively recent use of the air by aircraft, the rules are less well established than for territorial waters. Uncertainty as to the possible use of the air by belligerents during the World War led neutrals to enunciate rules that may have been more extreme than neutrality requires. This seems to have been true in regard to submarines when the rules proposed by the Washington Conference on Limitation of Armament, 1921–22, are compared with those adopted by the London Conference in 1930.

It may, therefore, be open to question whether the dirigible belonging to a belligerent air force should be subject to special restrictions in a neutral airport to any greater degree than a belligerent cruiser in a maritime port. It is true that there has always been a tendency to put special restrictions upon novel means of warfare. It may, however, not be any more logical to restrict aircraft specially because of speed or the use of the air than specially to restrict fast cruisers or submarines on account of speed or use of novel methods of navigation. The hydroplane may be part of the time upon the surface of the water and part of the time above and the submarine may similarly be on and below the surface.

It is true that the Commission of Experts in 1923 drew up regulations at The Hague placing special disa-

bilities upon aircraft by stringent limitations in time of war. The feeling at that time was still influenced by events of the World War and aircraft were not so widely and generally used as in later years. In 1899 the discharge of projectiles and explosives from aircraft for a period of five years was prohibited by a declaration drawn up at The Hague and this declaration was generally ratified. A declaration in 1907 to like effect to extend to the close of the Third Peace Conference, proposed for but not held in 1915, was not even signed by some of the leading states.

The Hague regulations of 1923 have not been ratified and probably would require extended modification to meet present conditions. Aircraft are much more commonly used than in 1923. Regular routes are established. Mails are regularly dispatched by aircraft. Passengers rely on air service to reach their destinations on time.

If there are to be neutrals in time of war, their rights should be entitled to respect and neutrals should be entitled to communicate with the belligerents in the customary manner save they must not be of either party in the war.

Special provisions.—While there is a general support of the 3-mile limit of jurisdiction over the marginal sea at the present time, there are many states which claim wider jurisdiction. Some states make these wider claims on grounds of long practice, some on geographical configuration and others on special national grounds. The United States has negotiated a large number of treaties regarding the suppression of the traffic in alcoholic liquors in which there are expressions showing that the parties intend “to uphold the principle that 3 marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters.” Some states have negotiated such treaties with the proviso that “The High Contracting Parties respectively retain their rights and claims, with-

out prejudice by reason of this agreement, with respect to the extent of their territorial jurisdiction." France, which has such a proviso, has maintained that it would be difficult to reach an agreement on the breadth of territorial waters saying:

The political, economic and social interests of coastal States are not only different, but often conflicting, on account of the position and geographical configuration of the territory and coasts of those States. (Conference for the Codification of International Law, Vol. II, Territorial Waters, League of Nations, C. 74, M. 39, 1929, V, p. 28.)

The "Anna," 1805.—An early case showed the soundness of Sir William Scott's (Lord Stowell) reasoning even when considering a foreign state. In the case of the *Anna*, 1805, he said:

The capture was made, it seems, at the mouth of the Mississippi, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is "*terrae dominium finitur, ubi finitur armorum vis*," and since the introduction of firearms, that distance has usually been recognized to be about 3 miles from the shore. But it so happens in this case, that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the River, which form a kind of portico to the main land. It is contended that these are not to be considered as any part of the territory of America, that they are a sort of "no mans land," not of consistency enough to support the purposes of life, uninhabited and resorted to, only, for shooting and taking birds nests. It is argued that the line of territory is to be taken only from the Balise, which is a fort raised on made land by the former Spanish possessors. I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast on which they border, and from which indeed they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law, *Quod vis fluminis de tuo praedio detraxerit, & vicino praedio attulerit, palam tuum remanet*, even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendant to the main-

land, and as comprized within the bounds of territory. If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least that they might be so occupied by European nations, and then the command of the River would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to shew, that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

I am of opinion that the right of territory is to be reckoned from those islands. That being established, it is not denied that the actual capture took place within the distance of 3 miles from the islands, and at the very threshold of the river. (5 C. Robinson, Admiralty Report, pp. 373, 385b.)

British position, 1924.—In reply to the questionnaire sent out by the League of Nations preparatory to the Conference for the Codification of International Law differing replies were received. As to the breadth of territorial waters, Great Britain, saying that the British Government made no claim to exercise jurisdiction beyond the 3-mile limit, nevertheless, stated:

There are certain banks outside the 3-mile limit off the coasts of various British dependencies on which sedentary fisheries of oysters, pearl oysters, chanks or bèches de mer on the sea bottom are practised, and which have by long usage come to be regarded as the subject of occupation and property. The foregoing answer is not intended to exclude claims to the sedentary fisheries on these banks. The question is understood to relate only to claims to exercise rights over the waters of the high seas.

(d) Claims by foreign States to exercise rights of jurisdiction or control over the waters of the high seas adjacent to the belt of territorial waters of those States have never been admitted and have always been objected to by His Majesty's Government in Great Britain.

His Majesty's Government admit that the speed of modern vessels and aircraft and the immense range and power of modern implements of warfare may render a belt of 3 miles insufficient to prevent injurious consequences resulting in the national territory from acts which have taken place on the high seas,

but this affords no sufficient argument for a change in the 3-mile limit. To ensure that no injurious consequence should result within the national territory from an act which has taken place on the high seas, it would be necessary to establish a belt so wide as to constitute a serious encroachment on the high seas. A belt of such width would lead to perpetual disputes. The difficulty of determining with accuracy whether a vessel is within the coastal belt would be increased very largely if the width of that belt were increased, as the greater the distance from the shore the more difficult it is to fix by reference to the shore the exact position of the vessel. Furthermore, the burden imposed on neutral States in time of war would be intolerable.

His Majesty's Government accept the view that no State can be expected to tolerate with equanimity circumstances arising under which, owing to peculiar local circumstances, the absence of jurisdiction over foreign vessels on the high seas immediately contiguous to its territorial waters may prejudice gravely the enforcement of the laws or the well-being of the community within its territory.

Where such circumstances arise, it is the duty of any foreign State to come to an agreement enabling the State concerned to exercise such rights of control over the merchant vessels of the foreign State concluding the agreement as may be necessary. For a State to refuse to enter into an agreement of this kind would be to show an entire absence of the consideration for the rights of other States upon which the solidarity of nations depends. (Conference for the Codification of International Law, Vol. II, Territorial Waters, League of Nations, C. 74, M. 39, 1929, V, p. 28.)

India assumed the same position, and Australia said:

They make no claim to exercise rights over the high seas outside the belt of territorial waters. This answer is made on the understanding that the question relates only to claims to exercise sovereign rights over the waters of the high seas, and does not relate to claims to exercise jurisdiction over sedentary fisheries for pearl oysters and bêche de mer, etc., on certain portions of the sea bottom outside the 3-mile limit which by long usage have come to be regarded as the subject of occupation and property. (Ibid., p. 24.)

Hague Report, 1923.—The Report of the Commission of Jurists, 1923, appointed to consider new agencies of warfare submitted certain rules that have not been ratified but are the latest expression of the result of of-

ficial international deliberation. Articles 47 and 48 of these rules provide:

"A neutral State is bound to take such steps as the means at its disposal permit to prevent within its jurisdiction aerial observation of the movements, operations or defences of one belligerent, with the intention of informing the other belligerent."

The prohibition of aerial observation within neutral territory on belligerent account must apply equally to the case of aircraft on board belligerent warships when in neutral waters. To avoid all misconception on this point, the following paragraph has been added:

"This provision applies equally to a belligerent military aircraft on board a vessel of war."

The measures which a neutral Government may be obliged to take to compel respect for its rights may entail the use of force; fire may have to be opened on foreign aircraft, even military aircraft of another State. Following the analogy of article 10 of Convention V of 1907 (Rights and Duties of Neutral Powers in Land War) and article 26 of Convention XIII (Rights and Duties of Neutral Powers in Maritime War), it has been thought well to declare that the measures, even of force, taken by a neutral Power for this purpose cannot be regarded as acts of war. Still less could they be regarded as unfriendly acts, seeing that they are taken in specific exercise of rights conferred or recognised by treaty.

It may be well to add that the neutral Government will not be responsible for any injury or damage done to the aircraft or other object.

"ARTICLE 48

"The action of a neutral Power in using force or other means at its disposal in the exercise of its rights or duties under these rules cannot be regarded as a hostile act." (1924, Naval War College, International Law Documents, p. 136.)

The report of the commission had also referred to differences in the proposed limits of airspace and territorial waters saying:

On principle it would seem that the jurisdiction in the airspace should be appurtenant to the territorial jurisdiction enjoyed beneath it, and that in the absence of a territorial jurisdiction beneath, there is no sound basis for jurisdiction in the air. (Ibid., p. 152.)

League of Nations committee, 1926.—The League of Nations Committee of Experts for the Progressive Codification of International Law in 1926 communicated the report of a subcommittee on the law of territorial waters to the governments. The subcommittee stated that "The question of territorial waters involves a number of difficult problems of international law." The subcommittee found that many attempts had been made to formulate the law of territorial waters and that most diverse theories had been put forward upon the subject.

League of Nations draft, 1926.—The draft of a convention as submitted by Professor Schücking after discussion with the committee of experts appointed by the League of Nations as preparatory to the codification of the law of territorial waters, after escaping the 3-mile limit for coast waters and the 10-mile limit for bays, contained the following:

ARTICLE 5

Islands

If there are natural islands, not continuously submerged, situated off a coast, the inner zone of the sea shall be measured from these islands, except in the event of their being so far distant from the mainland that they would not come within the zone of the territorial sea if such zone were measured from the mainland. In such case, the island shall have a special territorial sea for itself.

In the case of archipelagoes, the constituent islands are considered as forming a whole and the width of the territorial sea shall be measured from the islands most distant from the centre of the archipelago.

ARTICLE 6

Straits

The régime of straits at present subject to special conventions is reserved. In straits of which both shores belong to the same State, the sea shall be territorial, even if the distance between the shores exceeds 10 miles, provided that that distance is not exceeded at either entrance to the Strait. (League of Nations Document, C. 196, M. 70, 1927, V. p. 72.)

Attitude of Portugal, 1926.—In replying to the League of Nations questionnaire as to territorial waters in 1926, the Portuguese Government said:

Article V. If there are natural islands, not continuously submerged, situated off a coast at a distance from the coast not above 24 miles, the zone of the territorial sea shall be measured from these islands. When the distance of the islands from the coast is above 24 miles, these islands shall have a territorial sea for themselves, as if they were part of the mainland.

In the case of an archipelago, the component islands shall be considered as forming a whole, and the width of the territorial sea shall be measured from the islands most distant from the centre of the archipelago (see Observations). (League of Nations Documents, C. 196, M. 70, 1927, V [C. P. D. I. 95 (2)], p. 189.)

The observations to which reference is made are as follows:

Portugal is unable to forego a very much wider limit to her territorial waters than 3 miles, since it is absolutely necessary for her to preserve the species of fish which inhabit her waters, these fisheries contributing largely towards the feeding of her population and the employment of her industries. If these species become rare or disappear Portugal's economic crisis, which is already acute, will be considerably aggravated.

What is true of Portugal is also true of many other countries and therefore this claim does not constitute a special case. This extended limit has indeed become an established usage in Portugal and in other countries, and is embodied in the legislations of Portugal and various nations, as was first pointed out in detail by the distinguished Professor Shücking in his masterly report to the Committee of Experts for the Progressive Codification of International Law. Beyond doubt, the present needs of the nations are of more importance than traditions and ancient usage, and therefore Portugal demands the extension to 12 miles of the limit of territorial waters, as being more in conformity with present practice and the present needs of the majority of States. If, however, for one reason or another, this extension is impossible, Portugal considers that a minimum limit of 6 miles should be fixed and that States should have the right, in order to satisfy their vital needs or those of their defence, to exercise administrative rights over a further zone of 6 miles beyond the zone of their sovereignty.

The limits for islands, archipelagoes, bays and straits were fixed on the supposition that the limit of territorial waters

was itself extended to 12 miles; if this limit is lowered, it will be necessary also to restrict the zones fixed for these special cases. (Ibid., p. 191.)

Sweden, 1926.—The Swedish Government in replying to the League of Nations questionnaire in 1926 pointed out that Sweden had for more than 100 years maintained a 4-mile claim to jurisdiction off the coast and that 12-mile limit for bays would be essential for Sweden.

As to islands and straits, the Government said:

Article 5.—Islands.

One observation is necessary with regard to the wording of this article. If the centre of an archipelago is regarded as the point for determining the isles from which the calculation of territorial waters is to commence, the provision regarding archipelagos would seem to apply only to those which are situated in the open sea; it could not, for instance, apply to groups which, like the Swedish coastal archipelagos (*skärgård*), fringe the shoreline. To make Article 5 applicable to the conditions of Swedish geography, it would therefore be necessary to add a provision to the effect that when an archipelago fringes the coast, the extent of the territorial waters shall be calculated as commencing from the islands and reefs furthest from the coast.

Article 6.—Straits.

The drafting of Article 6 also calls for an observation on the part of the Swedish Government. In certain respects this article is not quite clear, as, for instance, the provision which lays down "the régime of straits at present subject to special conventions." Does this provision mean that if two States whose coast line borders certain straits conclude an agreement dividing the whole of the straits between them, this agreement can be invoked against third parties, even when, under the convention now proposed, the straits also include international waters? According to the Rapporteur's original draft, which fixed the extent of the territorial waters at 6 nautical miles in general, straits not exceeding 12 miles in width were to belong entirely to the riparian States. The extent of territorial waters having been reduced to 3 nautical miles in the Rapporteur's second draft, the logical consequence would have been to regard as entirely territorial waters only those straits which are less than 6 nautical miles in breadth, or—when both shores of the straits belong to the same State—those which are not more than 6 nautical miles wide at their opening towards the sea. The draft, however, fixes at 10 miles the maximum width of straits which

are to form part of the territorial sea of the coastal States. The meaning of the formula "straits not exceeding 10 miles in width" is also somewhat uncertain, for there is nothing to show whether this formula only applies to straits which do not exceed 10 miles in width at any point or whether it refers to those parts of straights where the width is 10 miles or less, whereas in other parts their width is more than 10 miles.

Moreover, as regards the Swedish standpoint in this matter, the Swedish Government would point out that, since the Treaty of Roskilde in 1658, one-half of the Sund has been regarded as a Swedish territorial sea. Similarly the Straits of Kalmar, of which both sides belong to Sweden, are regarded as entirely Swedish territorial waters. At their opening towards the sea these two straits are both slightly over 10 nautical miles in width. (League of Nations Documents, C. 196, M. 70, 1927, V. [C. P. D. I. 95 (2)], p. 232.)

Norwegian opinion, 1927.—In reply to the questionnaire preparatory to the meeting of the Committee on the Codification of International Law, the Norwegian Government in a letter of March 3, 1927, said:

Article 2.—Extent of the Rights of the Riparian State.— * * *

As regards the tracing of the boundaries, it should be observed that the series of fjords and archipelagos (*skärgård*) which are so characteristic a feature of the peculiar Norwegian coast line, with its numerous fjords penetrating right into the heart of the country and with its countless islands, large and small, islets and rocks scattered in a wide band along practically the whole of the coast, has made it quite impossible for Norway to trace a boundary for her territorial waters corresponding to all the sinuosities of her coast line and *skärgård*. The boundary has therefore been drawn at a distance of 1 geographical league from the extreme edge of the coast at low tide or from straight lines drawn between the last outlying islets or rocks not constantly covered by the sea, while, outside the bays and fjords (which from the most ancient times have been regarded and claimed *in extenso* as internal Norwegian waters), the limit has been measured from a line drawn between the two farthestmost seaward ends of the coast (mainland, isle or islet).

The Norwegian Government considers that, in these circumstances, it would be desirable—and, if Norway is to adhere to the proposed Convention, necessary—so to draft the present article that, as regards the extent and delimitation of the zone

of sovereignty itself, it should, like Article 4, which relates to bays, take into proper account a peculiar *de facto* situation which has been consecrated by continuous and century-old usage.

In the opinion of the Norwegian Government, it would be neither natural nor reasonable to fix an identical limit of territorial waters for all coasts without taking into account the various characteristics of the latter and without making due allowance for the varying importance, from the point of view of national economy and the very existence of the inhabitants, of the question of maintaining for the coastal population an exclusive right to exploit the economic wealth of the territorial sea. It would not even seem necessary to fix a standard boundary and we do not see how it would be possible to obtain such a result on the lines laid down in the draft Convention. * * *

Article 5.—Islands.—As stated above, the boundary of Norwegian territorial waters is, according to Norwegian law, traced at a distance of 1 geographical league from the islands, islets or rocks farthest seaward which are not constantly covered by the sea. The general provision at present in force on this subject, contained in a Chancellery Memorandum of February 25, 1812, does not stipulate any limit as regards the distance between these islands, islets and rocks and the mainland; it thus provides for a territorial sea extending in one continuous band along the coast to a distance of 1 geographical league from the islands, islets or rocks farthest seaward without taking account of the distance which separates the latter from the continental coast line.

In conformity with the observations it has felt bound to offer in connection with Article 2 of the Draft, the Norwegian Government feels that it would be desirable to draft the passages of Article 5, which concern the delimitation of territorial waters around islands, in such a way as to bring them reasonably into line with Norwegian law on this subject, which owes its origin to the peculiar geographical conditions of the country and has been consecrated by continuous and century-old usage. (League of Nations, Report to the Council, C. 196, M. 70, 1927, V [C. P. D. I. 95 (2)], p. 173.)

Control of straits.—The most recent discussion of the control of waters of straits is that carried on by the Harvard Law School Research in International Law which acted through a committee made up of men familiar with international law and from all parts of the United States. After wide research and discussion, the report

made in 1929 upon the article relating to straits was with some omissions and some additions as follows:

ARTICLE 10

A strait connecting high seas shall remain open to navigation by the private and public vessels of all states, including vessels of war.

Comment.—This article states the existing rule of international law which requires that straits connecting high seas shall be open to navigation. This rule applies even though the land on both sides is a part of the territory of a single state; it applies to all straits.

The Straits to which negotiations have most often related are the Bosphorus and Dardanelles, the Danish Sounds and Belts, and the Straits of Magellan.

b. Bosphorus and Dardanelles.—The Bosphorus is about 18 miles long and from $\frac{1}{2}$ to $1\frac{1}{2}$ miles wide. The Dardanelles is about 40 miles long and from $1\frac{1}{2}$ to 4 miles wide.

In the Near East the struggle for dominance has made the Straits question one of the major matters of European policy. Turkey long in possession of the area bordering upon the Black Sea assumed full authority over the waters at its entrance. From the end of the eighteenth century navigation of the Black Sea and the Straits became a matter of international negotiation.

The treaty of Belgrade, September 18, 1739, between Russia and Turkey provides in article 3 "Que la Russie ne pourra, ni sur la mer de Zabache (Sivache), ni sur la mer Noire, construire et avoir de flotte et d'autres navires" (I Noradounghian, *Recueil d'Actes Internationaux de l'Empire Ottoman*, p. 260), and in article 9 "Et réciproquement il sera permis à tous les marchands sujets de l'Empereur des Russies, d'exercer aussi librement le commerce dans les états de la Porte Ottomane. Mais, pour ce qui regarde le commerce des Russes sur la mer Noire, il sera fait sur les bâtiments appartenants aux Turcs." (Ibid., p. 262.)

By the treaty of July 13, 1841, in article 1 it was stated: "Sa Hautesse le sultan déclare qu'il a la ferme résolution de maintenir à l'avenir le principe invariablement établi comme ancienne règle de son empire, et en vertu duquel il a été de tout temps défendu aux bâtiments de guerre des puissances étrangères d'entrer dans les détroits de Dardanelles et du Bosphore et que tant que la Porte se trouve en paix, Sa Hautesse n'admettra aucun bâtiment de guerre étranger dans les dits détroits," "et leurs Majestés * * * de l'autre part, s'engagent à respecter cette détermination du Sultan, et à se conformer au principe ci-dessus énoncé." (Martens, N. R. G. 1841, II, p. 128.) Thus the position of Turkey in control of the Straits seemed to be confirmed and was reaffirmed by the treaty of 1856. Many volumes have been written upon various aspects of the questions of closing the Black Sea and the Straits.

The United States not being a party to these treaties did not recognize the control of the Bosphorus and Dardanelles as a right though it was impossible to deny the usage.

The World War introduced new problems which are not yet settled. Article 178 of the treaty of Sèvres, August 10, 1920, proposed to guarantee the freedom of the Straits. Upon general principles of law apart from all considerations of politics, there seems no reason for maintaining that the Black Sea is a closed sea and that the Straits are under the control of Turkey any more than there might be for contending that the Baltic Sea is a closed sea and that the sounds may be closed.

Danish Sounds.—The claim that the Baltic Sea should be a closed sea has been made for varying reasons.

Under article 5 of the treaty between the United States and Denmark of 1826 it was agreed that "Neither the vessels of the United States nor their cargoes shall, when they pass the Sound of the Belts, pay higher or other duties than those which are or may be paid by the most favored nation." (8 U. S. Stat. 340.) This

treaty was to remain in effect for 10 years and for "one year after either of the contracting parties shall have given notice to the other of its intention to terminate the same."

The United States in 1855 gave notice of the termination of the treaty of 1826 and a new treaty was negotiated in 1857 by which, in article 1, entire freedom of navigation was declared for American vessels in the Sound and Belts. (11 Stat. 719.) The United States in consideration of the Danish engagement to keep up lights and buoys and to make "additions and improvements in regard to the lights, buoys and pilot establishments" as might be required, agreed to pay to Denmark \$393,011. Certain European powers similarly accepted their respective quotas by a conventional agreement. The Sound dues were no longer collected and the navigation between the North Sea and the Baltic became free.

Under the public law of nations it can not be pretended that Denmark has any right to levy duties on vessels passing through the sound from the North Sea to the Baltic. Under that law the navigation of the two seas connected by this strait is free to all nations; and therefore the navigation of the channel by which they are connected ought also to be free. In the language employed by Mr. Wharton "even if such strait be bounded on both sides by the territory of the same sovereign and is at the same time so narrow as to be commanded by cannon-shot from both shores, the exclusive territorial jurisdiction of that sovereign over such strait is controlled by the right of other nations to communicate with the seas thus connected." (House Ex. Doc. 108, 33 Cong., 1 sess., 1848, pp. 38-39.)

Straits of Magellan.—The Straits of Magellan, about 300 miles long and from $2\frac{1}{2}$ to 11 miles wide form a convenient passage between the great oceans which wash the coasts of the South American continent. At the eastern entrance the Argentine Republic and Chile have territory upon opposite shores though the most of the Straits is wholly between Chilean shores.

The treaty of 1848 between these states gave rise to many difficulties. At length by the treaty of July 23, 1881, between the Argentine Republic and Chile, it was agreed, "Article 5. Le D troit de Magellan demeure neutralis     perp tuit   et sa libre navigation est assur  e aux pavillons de toutes les nations. Afin d'assurer le respect de cette libert   et de cette neutralit   il ne sera construit sur ses c tes, ni fortifications, ni ouvrages de d fense militaire qui puissent contrarier ce but." (Martens, N. R. G. XII, 2e Ser. 491; 72 Brit. and For. State Papers, p. 1103.)

The World War conditions gave rise to questions as to the nature of the neutrality under the treaties. As the greater part of the Straits of Magellan is under the jurisdiction of Chile, that state early made known its attitude. A decree of December 15, 1914, stated, "In reference to the neutrality established in the decree No. 1857 of November 5 last of the ministry of foreign affairs, the interior waters of the Straits of Magellan and the canals of the southern region, even in parts which are distant more than 3 miles from either bank, should be considered as forming part of the jurisdictional or neutral sea." (1916 Naval War College, International Law Topics, p. 21.)

In the case of the *Bangor* coming before the British Prize Court in 1916, it was said:

The limits of territorial waters, in relation to national and international rights and privileges, have of recent years been subject to much discussion. It may well be that the old marine league, which for long determined the boundaries of territorial waters, ought to be extended by reason of the enlarged range of guns used for shore protection.

This case does not, in my view, call for any pronouncement upon that question. I am content to decide the question of law raised by the claimants upon the assumption that the capture took place within the territorial waters of the Republic of Chile. This assumption, of course, does not imply any expression of opinion as to the character of the Strait of Magellan as between Chile and other nations. This strait connects the

two vast free oceans of the Atlantic and Pacific. As such, the strait must be considered free for the commerce of all nations passing between the two oceans.

In 1879 the Government of the United States of America declared that it would not tolerate exclusive claims by any nation whatsoever to the Strait of Magellan, and would hold responsible any Government that undertook, no matter on what pretext, to lay any impost on its commerce through the strait. Later, in 1881, the Republic of Chile entered into a treaty with the Argentine Republic by which the strait was declared to be neutralized forever, and free navigation was guaranteed to the flags of all nations.

I have referred to these matters in order to show that there is a right of free passage through the strait for commercial purposes. It is not inconsistent with this that, during war between any nations entitled to use it for commerce, the strait should be regarded in whole or in part as the territorial waters of Chile, whose lands bound it on both sides.

Upon the assumption made for the purposes of this case that the *Bangor* was in fact captured within the territorial waters of a neutral, the question is whether the vessel was immune from legal capture and its consequences according to the law of nations. In other words, can the owners of the vessel, who are, *ex hypothesi*, to be treated as enemies, rely upon the territorial rights of a neutral State and object to the capture? Or must the objection to the validity of the capture come from the neutral State alone?

No proposition in international law is clearer, or more surely established, than that a capture within the territorial waters of a neutral is, as between enemy belligerents for all purposes rightful; and that it is only by the neutral State concerned that the legal validity of the capture can be questioned. ([1916], Probate, p. 181.)

Straits connecting open seas.—Extreme claims as to straits had been made at various times as the English claims to Bristol and St. George’s Channels. As in the case of the Danish Sounds, these have gradually disappeared. The United States properly contended that any freedom of the seas or freedom of navigation would be largely a fiction if passage between the different seas might be closed at the will of the shore states or if a tax were levied for simple passage.

It is a source of much satisfaction to Her Majesty's Government that the initiative in bringing this question to a final settlement should have been taken by the Danish Government, for altho the right to levy dues upon foreign vessels passing through the Sound has been recognized by the different powers of Europe, and had become a part of the international law of Europe, yet it has long been apparent that a tax which is oppressive to commerce, for which no benefit is offered in return to foreign shipping * * * could not be permanently maintained. (46 Brit. and For. State Papers, 1855-1856, p. 661.)

The resolutions adopted by the Institut de Droit International, at its session in 1892 provide:

Article 10. Les dispositions des articles précédents s'appliquent aux détroits dont l'écart n'exède pas douze milles, sauf les modifications et distinctions suivantes:

1. Les détroits dont les côtes appartiennent à des Etats différents font partie de la mer territoriale des Etats riverains, qui y exerceront leur souveraineté jusqu'à la ligne médiane.

2. Les détroits dont les côtes appartiennent au même Etat et qui sont indispensables aux communications maritimes entre deux ou plusieurs Etats autres que l'Etat riverain font toujours partie de la mer territoriale du riverain, quel que soit le rapprochement des côtes.

3. Les détroits qui servent de passage d'une mer libre à une autre mer libre ne peuvent jamais être fermés.

Article 11. Le régime des détroits actuellement soumis à des conventions ou usages spéciaux demeure réservé. (13 Annuaire, p. 330.)

Treaties and conventions.—The status of straits has often been a subject of treaty regulation. An early example is the treaty between Great Britain and Russia, 1825:

Article III. Commencing from the Southernmost Point of the Island called *Prince of Wales* Island, which Point lies in the parallel of 54 degrees 40 minutes North latitude and between the 131st and the 133rd degree of West longitude (Meridian of Greenwich), the said line shall ascend to the North along the channel called *Portland Channel* as far as the Point of the Continent where it strikes the 56th degree of North Latitude. (Convention between Great Britain and Russia, St. Petersburg, Feb. 1/16, 1825. 12 Brit. & For. State Papers, p. 38.)

In commenting on this article, Professor J. Guillermo Guerra in his study, "Les Eaux Territoriales dans les Détroits," published in *Revue Générale de Droit International Public*, Vol. 31, pp. 232-254, writes as follows:

Ce traité fut ensuite appliqué dans les rapports de la Grande-Bretagne et des Etats-Unis, qui avaient succédé aux droits de la Russie sur le territoire de l'Alaska. S'il n'a pas indiqué en termes exprès la ligne qui devait être suivie dans la démarcation des souverainetés sur le canal de Portland, d'une étendue de 60 milles, les deux gouvernements l'ont du moins interprété en ce sens que c'est la ligne médiane qu'il faut prendre en considération.

By Article III of the treaty of Nanking, 1842, between Great Britain and China (Treaties between China and Foreign States, published by order of Inspector General of Customs, p. 351) it was provided that China should cede Hong Kong to Great Britain. In commenting upon Article III of this treaty Professor Guerra says:

En 1842 par le traité de Nankin (Art 3), la Grande-Bretagne acquit la souveraineté sur la petite île de Hongkong, située à l'entrée de l'estuaire de Canton. Cette petite île est séparée du continent chinois par la passe de Laimun dont la largeur est si réduite qu'elle n'atteint pas un mille. Dans le traité de cession, rien ne fut stipulé au sujet de la juridiction anglaise ou de la juridiction chinoise sur les eaux du petit détroit qui séparait ainsi les deux souverainetés. Mair, d'après le témoignage de Sir Travers Twiss, d'Oppenheim et d'autres auteurs encore, les deux puissances ont en fait exercé leur juridiction séparément jusqu'au fil moyen des eaux.

The treaty of June 15, 1846, Great Britain and the United States provides:

Article I. From the point on the forty-ninth parallel of north latitude, where the boundary laid down in existing treaties and conventions between the United States and Great Britain terminates, the line of boundary between the territories of the United States and those of her Britannic Majesty shall be continued westward along the said forty-ninth parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly through the middle of the said channel, and of Fuca's Straits, to the Pacific Ocean:—*Provided, however*, That the navigation of the whole of the said

channel and straits, south of the forty-ninth parallel of north latitude, shall remain free and open to both parties. (9 U. S. Stat. 869.)

In commenting on the above article, Hall, *International Law*, Eighth Edition, edited by Pearce Higgins, writes as follows:

By the treaty of Washington of 1846 it was stipulated that the boundary between the United States and British North America should follow the forty-ninth parallel of latitude to the middle of the strait separating Vancouver's Island from the continent and from there should run down the middle of the Strait of Fuca to the Pacific. Disputes involving the title to various islands having arisen, the boundary question at issue between the two nations was submitted to the arbitration of the German Emperor and in 1873 a protocol was signed at Washington for the purpose of marking out the frontier in accordance with his arbitral decision. Under this protocol, the boundary after passing the islands which had given rise to the dispute is carried across a space of water 35 miles long by 20 miles broad, and is then continued for 50 miles down the middle of a strait 15 miles broad until it touches the Pacific Ocean midway between Bonilla Point on Vancouver's Island and Tatooch Island lighthouse on the American shore, the waterway being there $10\frac{1}{2}$ miles in width (p. 195).

The treaty of Copenhagen, March 14, 1857.—"Treaty between Great Britain, Austria, Belgium, France, Hanover, Mecklenburg-Schwerin, Oldenburg, Netherlands, Prussia, Russia, Sweden and Norway, and the Hanse Towns, on the one part, and Denmark, on the other part, for the Redemption of the Sound Dues."

Article I. De ne prélever aucun droit de douane, de tonnage, de balisage * * * sur les navires qui se rendront de la Mer du Nord dans la Baltique, ou *vice versa*, en passant par les Belts ou le Sund, soit qu'ils se bornent à traverser les eaux danoises * * *. (47 Brit. and For. State Papers, 1856-1857, p. 24.)

A declaration to the following effect between Great Britain and France was signed at London, April 3, 1904, respecting Egypt and Morocco:

Article VII. In order to secure the free passage of the Straits of Gibraltar, the two Governments agree not to permit the erection of any fortifications or strategic works on that portion of the coast of Morocco comprised between, but not including, Melilla and the heights which command the right bank of the River Sebou. (97 Brit. and For. State Papers, 1903-1904, p. 40.)

A convention of April 11, 1908, between Great Britain and the United States relating to the international boundary provided:

The remaining portion of the line, lying between the two above-described sections, and upon the location of which the said former Commissioners did not agree, shall pass through the center of the Lubec Narrows Channel between Campo Bello Island and the mainland. (35 U. S. Stat. 2003.)

A further treaty, May 21, 1910, between Great Britain and the United States concerning the boundary line in Passamaquoddy Bay provided:

Now, Therefore, upon the evidence and arguments so presented, and after taking into consideration all actions of the respective Governments and of their representatives authorized in that behalf and of the local governments on either side of the line, whether prior or subsequent to such treaties and award, tending to aid in the interpretation thereof, the High Contracting Parties hereby agree that the location of the international boundary line between the United States and the Dominion of Canada from a point in Passamaquoddy Bay accurately defined in the Treaty between the United States and Great Britain of April 11, 1908, as lying between Treat Island and Friar Head, and extending thence through Passamaquoddy Bay and to the middle of Grand Manan Channel, shall run in a series of seven connected straight lines for the distances and in the directions as follows. (36 U. S. Stat. 2477.)

The Bosphorus and Dardanelles, 1920-1923.—The Bosphorus and Dardanelles have from early times been the scene of controversies. Regulation of the use of the Straits has been the subject of many diplomatic discussions. For a long time the use of the Straits was governed by the treaties of 1856 and 1871 by which vessels of war were in general excluded.

The postwar negotiations resulted in the unratified treaty of Sèvres, August 10, 1920, in which among the articles relating to the Straits were the following:

Article 37. The navigation of the Straits, including the Dardanelles, the Sea of Marmora and the Bosphorus, shall in future be open, both in peace and war, to every vessel of commerce or of war and to military and commercial aircraft, without distinction of flag.

These waters shall not be subject to blockade, nor shall any belligerent right be exercised nor any act of hostility be committed within them, unless in pursuance of a decision of the Council of the League of Nations.

Article 38. The Turkish Government recognizes that it is necessary to take further measures to ensure the freedom of navigation provided for in Article 37, and accordingly delegates, so far as it is concerned, to a Commission to be called the Commission of the Straits, and hereinafter referred to as the Commission, the control of the waters specified in Article 39.

The Greek Government, so far as it is concerned, delegates to the Commission the same powers and undertakes to give it in all respects the same facilities.

Such control shall be exercised in the name of the Turkish and Greek Governments respectively, and in the manner provided in this Section.

Article 39. The authority of the Commission will extend to all the waters between the Mediterranean mouth of the Dardanelles and the Black Sea mouth of the Bosphorus, and to the waters within 3 miles of each of these mouths.

This authority may be exercised on shore to such extent as may be necessary for the execution of the provisions of this Section.

The treaty of Lausanne, July 24, 1923, which became operative provided:

Article 23. The high contracting parties are agreed to recognize and declare the principle of freedom of transit and of navigation, by sea and by air, in time of peace as in time of war, in the strait of the Dardanelles, the Sea of Marmora and the Bosphorus, as prescribed in the separate convention signed this day, regarding the régime of the Straits. This convention will have the same force and effect in so far as the present high contracting parties are concerned as if it formed part of the present treaty. (28 L. N. T. S., p. 13; see also 18 Amer. Journal International Law, Supplement, 1924, p. 11.)

In the convention relating to the régime of the Straits also signed July 24, 1923, it was provided in regard to (2) warships, including fleet auxiliaries, troopships, aircraft carriers, and military aircraft:

(a) * * *

(b) In time of war, Turkey being neutral.

Complete freedom of passage by day and by night under any flag, without any formalities, or tax, or charge whatever, under the same limitations as in paragraph 2 (a).

However, these limitations will not be applicable to any belligerent Power to the prejudice of its belligerent rights in the Black Sea.

The rights and duties of Turkey as a neutral Power cannot authorize her to take any measures liable to interfere with navigation through the Straits, the waters of which, and the air above which, must remain entirely free in time of war, Turkey being neutral, just as in time of peace.

Warships and military aircraft of belligerents will be forbidden to make any capture, to exercise the right of visit and search, or to carry out any other hostile act in the Straits.

As regards revictualling and carrying out repairs, war vessels will be subject to the terms of the Thirteenth Hague Convention of 1907, dealing with maritime neutrality.

Military aircraft will receive in the Straits similar treatment to that accorded under the Thirteenth Hague Convention of 1907 to warships, pending the conclusion of an international convention establishing the rules of neutrality for aircraft.

(c) *In time of war, Turkey being belligerent.*

Complete freedom of passage for neutral warships, without any formalities, or tax, or charge whatever, but under the same limitations as in paragraph 2 (a).

The measures taken by Turkey to prevent enemy ships and aircraft from using the Straits are not to be of such a nature as to prevent the free passage of neutral ships and aircraft, and Turkey agrees to provide the said ship and aircraft with either the necessary instructions or pilots for the above purpose.

Neutral military aircraft will make the passage of the Straits at their own risk and peril, and will submit to investigation as to their character. For this purpose aircraft are to alight on the ground or on the sea in such areas as are specified and prepared for this purpose by Turkey.

(3) (a) The passage of the Straits by submarines of Powers at peace with Turkey must be made on the surface. (28 L. N. T. S.,

p. 115; see also 18 Amer. Journal International Law, Supplement, 1924, p. 56.)

The proposed treaty with United States, signed August 6, 1923, would have covered many of the provisions of the treaty of Lausanne.

Islands and archipelagoes.—The Harvard Law School Research in International Law also considered maritime jurisdiction around islands and in its draft on territorial waters drew up the following:

ARTICLE 7

The marginal sea around an island, or around land exposed only at some stage of the tide, is measured outward 3 miles therefrom in the same manner as from the mainland.

Comment.—With some additions and omissions the comment on the article follows:

The practice is nearly uniform in beginning to measure the marginal sea from low water mark along the coasts of a mainland. The only difficulty arises in connection with rocks, islands, reefs, etc., lying off the coast. If an island lies not more than 6 miles from the coast, the marginal sea should be extended to a distance of 3 miles from the island. Similarly in any situation where islands are within 6 miles of the coast or of each other, marginal waters will mingle and form one extended zone. No different rule should be established for groups of islands or archipelagoes, except that if the outer fringe of islands are sufficiently close to form one belt, any wider expanse of water within such belt should be considered territorial. If all the islands of a group belong to one state and the separating distance is 6 and a fraction miles, thus leaving a narrow passage between marginal seas, it would seem equitable to permit an extension, but there can not be said to be any established rule on the point. It might be possible to agree that where the intervening passage is less than 1 mile (or less than one-half mile) in width, the littoral State may consider such waters as part of its marginal sea.

In the above connection, any rock, coral, mud, sand, or other natural solid formation which is exposed above the surface of the water at low tide, should be considered an "island." If a fringe of exposed rocks is situated at a distance of say 10 miles from the coast, there seems to be no established basis for considering all waters between the rocks and the mainland as territorial waters. Special consideration should, however, be accorded to claims established and maintained over a long period of time. Such may be the Scandinavian claims and those of Australia.

Attitude of the United States.—Mr. Bayard, Secretary of State, in a letter to Mr. Manning, Secretary of the Treasury, May 28, 1886, referred to the coastal jurisdiction of the United States:

We may, therefore, regard it as settled * * * that so far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond 3 miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of 3 miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign. (I Wharton, Digest of International Law, p. 107.)

Spitsbergen.—Special provision was made in regard to Spitsbergen by treaty on February 9, 1920.

In article 1 of this treaty, the powers recognized "the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen," etc., "between 10° and 35° longitude East of Greenwich and between 74° and 81° latitude North." In article 2 it is provided that—

ships and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters.

Norway shall be free to maintain, take or decree suitable measures to insure the preservation and, if necessary, the re-constitu-

tion of the fauna and flora of the said regions, and their territorial waters. (43 U. S. Stat. 1892.)

Legislation and decrees.—There has been from time to time legislation in regard to lands along the coast. A French law of 1912 provides:

Article 2. Pour l'application des règles de la convention XIII de la Haye en date du 18 octobre 1907:

“Les eaux territoriales françaises s'étendent en deçà d'une limite qui est fixée à 10 milles marins au large de la laisse de la basse mer le long de toutes les côtes et des bancs découvrants qui en dépendent, ainsi que autour du balisage fixe qui détermine la limite des bancs non découvrants.” (Journal officiel de la République Française, 1912, Sept.-Oct., p. 8976.)

Russia in pre-war days foresaw certain exceptional conditions on its icy coast.

1. Where the extent of the seashore radius is not defined by special international enactments or treaties, the present rules cover the coastal sea to a distance of 3 geographical miles (equals 12.02 marine miles equals 20.87 versts), counting from the line of lowest ebb-tide or from the extremity of the coastal standing ice. (Russian law No. 1066 of May 29, 1911; 1912 U. S. For. Rel., p. 1303.)

Uruguay in providing for neutrality proclaimed:

In accordance with the principle established by the treaty of Montevideo in 1889 (Penal Law, Article 12), and with the principles generally accepted in these matters, the waters will be considered as territorial waters, to a distance of 5 miles from the coast of the mainland and islands, from the visible outlying shoals, and the fixed marks which determine the limit of the banks not visible.” (Neutrality Proclamation of August 7, 1914, art. 2; 1916 Naval War College, International Law Documents, pp. 106-107.)

Differences of opinion.—Even on the matter of the measurement of territorial sea along the coast there remains difference of opinions. In regard to other maritime areas there is even wider variation of opinion. For the Conference for the Codification of International Law certain bases of discussion were drawn up by the preparatory committee in 1929. One of these was Basis of Discussion No. 3:

The breadth of the territorial waters under the sovereignty of the coastal State is 3 nautical miles.

The conference met at The Hague in 1930 and after discussion, a provisional expression of opinion as to the extent of territorial sea was proposed and, with the distinct understanding that the expression of opinion should not be regarded as final, the following statements were made:

Mr. Lansdown (Union of South Africa).—I beg to express my view in favour of Basis No. 3 as printed, that the breadth of territorial waters should be 3 nautical miles.

M. Schücking (Germany).—The German Delegation is in favour of the 3-mile rule, together with the existence of an adjacent zone, in the hope that the acceptance of the principle of the adjacent zone may facilitate the acceptance of the 3-mile rule by other countries.

Mr. Miller (U. S. A.).—I read one sentence which is contained in various existing treaties of the United States:

“The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coast line outwards and measured from low water mark constitute the proper limits of territorial waters.”

M. de Ruelle (Belgium).—We accept the 3-mile rule, together with a zone of adjacent waters.

Sir Maurice Gwyer (Great Britain).—The British Delegation firmly support Basis No. 3—that is to say, a territorial belt of 3 miles without the exercise, as of right, of any powers by the Coastal State in the contiguous zone, and they do that on three grounds, which I will express in as few words as I can: First, because in their view the 3-mile limit is a rule of international law already existing adopted by maritime nations which possess nearly 80 per cent of the effective tonnage of the world; secondly, because we have already, in this Committee, adopted the principle of sovereignty over territorial waters; and thirdly, because the 3-mile limit is the limit which is most in favour of freedom of navigation.

I ought to add that in this matter I speak also on behalf of His Majesty's Government in the Commonwealth of Australia.

Mr. Pearson (Canada).—The Government of Canada is in favour of the 3-mile territorial limit for all nations and for all purposes.

M. Marchant (Chile).—The Chilean Delegation will accept 6 miles as the breadth of territorial waters without an adjacent zone, or 3 miles with an adjacent zone.

M. W. Hsieh (China).—The Chinese Delegation accepts the Basis of Discussion No. 3 in principle.

M. Arango (Colombia).—I am in favour of the 6-mile limit.

M. de Armenteros (Cuba).—The Cuban Delegation is against Basis No. 3. I pronounce myself in favour of 6 miles with an adjacent zone.

M. Lorck (Denmark).—We are in principle in favour of Basis of Discussion No. 3, but as the rules concerning bays are very unsettled and the question of bays is of great importance to Denmark, it is impossible for me to give a definite decision at the moment.

Abel Hamid Badaoui Pacha (Egypt).—We are in favour of 3 miles territorial water, together with an adjacent zone.

M. Angulo (Spain).—In accordance with their amendment, the Spanish Delegation is in favour of 6 miles territorial water, together with an adjacent zone.

M. Varma (Estonia).—The Estonian Delegation wishes for the 3 miles territorial water, and an adjacent zone.

M. Erich (Finland).—For reasons of solidarity with its neighbours the Scandinavian States, the Finnish Delegation favours a zone of 4 miles for territorial waters, provided an adjacent zone of sufficient width is granted to her at the same time. In the latter case the Finnish Delegation could also accept a 3-mile zone, but primarily she favours a 4-mile zone. If, contrary to expectations, the majority of the Commission did not pronounce in favour of an adjacent zone, the Finnish Delegation reserves the right to come back to this question and to take a different attitude regarding the depth of territorial waters.

M. Gidel (France).—France has no objection to the acceptance of the 3-mile rule, provided that there is a belt of adjacent waters, and subject to the rules which may be agreed to in regard to the method of determining the datum line of the territorial belt.

M. Giannini (Italy).—May I ask my French colleague the meaning of the reservation he has made.

M. Gidel (France).—I will explain myself more fully on a subsequent occasion as I would not wish to prolong this process of voting. I thought however that I had made my meaning sufficiently clear; we desire an adjacent zone and we accept the 3-mile limit provided that a solution satisfactory to us is arrived at with regard to the datum line of the territorial belt.

M. Spiropoulos (Greece).—The Greek Delegation has already stated that they accept the 3-mile rule. They would even be prepared to accept 2 miles in the interests of the freedom of navigation if all States were prepared to accept it. As we have already accepted the 3-mile limit and the principle of sovereignty, the Greek Delegation considers that no adjacent zone is necessary. However, as there are some countries which desire a greater extent than 3 miles of territorial waters, they would even be prepared to accept an adjacent zone, particularly as Greece, according to the legislation at present in force, already possesses one.

Sir Ewart Greaves (India).—The Government of India accepts Basis No. 3.

Mr. Charles Green (Irish Free State).—The Government of the Irish Free State accepts Basis No. 3 as printed, but recognises that, in certain countries and for certain purposes, there are requirements of the nature set out in Basis No. 5.

M. Bjornssen (Iceland).—The Icelandic Delegation accepts 4 miles.

M. Giannini (Italy).—Six miles.

M. Mushakoji (Japan).—The Japanese Delegation accepts the 3-mile limit without an adjacent zone.

M. Albat (Latvia).—The Latvian Delegation accepts 6 miles with an adjacent zone.

M. Raestad (Norway).—As there is no binding rule of international law on this question, the Norwegian Government considers that it is necessary to take into consideration the requirements of the different countries. The Delegation pronounces in favour of the limit of 4 miles; that rule is older than the 3-mile rule.

With regard to other countries, the Norwegian Government would be prepared to recognize a greater width of territorial waters provided, as is stated in the Norwegian Government's printed reply, that the demand was based on continuous and ancient usage.

With regard to adjacent waters, they must be limited by the needs regarding customs and security.

Admiral Surie (Netherlands).—The Netherlands Delegation cannot give an opinion on the question of adjacent waters until it is informed what rights will be involved. It is, however, prepared to accept Basis No. 3 as regards the breadth of the territorial waters, which it accepts at three miles.

It bases its decision, first on the necessity of safeguarding the interest of commercial navigation on the high seas, and secondly, on the consideration of not placing any too heavy obligations on the Coastal State.

M. Sepahbodi (Persia).—The Persian Delegation accepts the 6-mile rule with an adjacent zone.

M. Makowski (Poland).—The Polish Delegation is in favour of a 3-mile breadth of territorial waters together with an adjacent zone sufficiently wide to enable the Coastal State to protect its legitimate interests.

M. de Magalhaes (Portugal).—The Portuguese Delegation has already said that it desires a territorial belt of 12 miles in width, but it is prepared to accept a belt of 6 miles provided there is an adjacent zone also of 6 miles in width.

The reason for the claim of a territorial belt of 6 miles is, firstly, because of the special position of Portugal on the continental plateau and its possession of fisheries which are vital to its interests, and secondly, for a general reason; that is to say, that the 3-mile limit is inadequate, as is proved by the claims for adjacent waters which have been put forward by many other countries, some of them demanding a great width for the adjacent zone.

They therefore accept the 6-mile belt together with adjacent waters, and in those adjacent waters they demand to be accorded police rights over fisheries such as have been recommended in all recent fishery congresses.

M. Meitani (Roumania).—The Roumanian Delegation accepts a territorial belt of 6 miles and reserves its attitude on the question of adjacent waters.

M. Sjöborg (Sweden).—The Swedish Delegation desires a territorial belt of 4 miles in width, but recognises as legitimate the other historic belts at present in force in a certain number of countries, that is, for example, 3 and 6 mile zones.

M. Sitensky (Czechoslovakia).—The Czechoslovak Delegation desires the greatest possible freedom of navigation, but not having any coast line they consider that they should abstain from proposing a definite extent for the zone of territorial waters.

Chinasi Bey (Turkey).—The Turkish Delegation desires a 6-mile belt of territorial waters with an adjacent zone.

M. Buero (Uruguay).—The Uruguayan Delegation desires a territorial belt of 6 miles and reserves its attitude on the question of adjacent waters.

M. Novakovitch (Yugoslavia).—The Yugoslav Delegation desires a territorial belt of 6 miles and reserves its attitude on the question of adjacent waters.

M. de Vianna-Kelsch (Brazil).—The Brazilian Delegation accepts a territorial belt of 6 miles for all purposes.

M. Egoriew (U. S. S. R.).—If one takes into consideration the state of positive law at the present time, as it can be discovered

in the legislation of the different States through treaties and diplomatic correspondence, it is necessary to recognise the great diversity of view which exists in the waters called territorial and adjacent. The exercise of such rights for all purposes or for certain purposes is admitted sometimes within the limit of 3, sometimes 4, 6, 10 or 12 miles.

The reasons, both historical and theoretical, invoked by some States and disputed by others, cannot be put into opposition to these facts and the rule or actual necessity for States to ensure their needs, particularly in waters along the coast which are not used for international navigation. This aspect which has been already noted in the literature on the subject, as well as in debates, in this Commission, cannot be overlooked. (League of Nations, C. 230, M. 117, 1930, V, Conf. C. D. I. 19 (2), p. 15.)

When the differences of opinion upon the fundamental question of coastal jurisdiction are diverse, it is evident that states may find grounds for demanding that their security be not endangered by too strict interpretation of the widely accepted rule of the 3-mile limit of maritime jurisdiction.

The "Fagernes."—The case of the *Fagernes* arose from a collision between the British owned steamship *Cornish Coast* and the Italian owned *Fagernes* on March 17, 1926. The collision took place in the Bristol Channel at a point "10 or 12½ miles distance from the English coast and 9½ or 7½ miles from the Welsh coast," according to the respective cases, the distance across the channel being about 20 sea miles. The question arose as to whether the collision took place within British jurisdiction. When the case came before the court in 1926, it was said of the place of collision, "If that spot is within the jurisdiction it is immaterial whether it is in England or in Wales. It is equally within the jurisdiction of the High Court." (1926, Probate Divorce and Admiralty, p. 185.) The point at which the collision occurred was held by Mr. Justice Hill to be within British jurisdiction. Later this case came before the judges of the Court of Appeal. For this court the

Attorney General was asked whether the Crown claimed that the place of collision was "within the realm of England."

The Attorney General replied that the Secretary of State for Home Affairs instructed him to say that "the spot where this collision is alleged to have occurred is not within the limits to which the territorial sovereignty of His Majesty extends." (1927, P., p. 319.)

In the opinion of Bankes, L. J., is mentioned the appearance of the Attorney General and it is stated that—he gave the Court an exhaustive statement of the opinions of jurists and text writers from very early times upon this much discussed question of the territorial jurisdiction over creeks, bays, etc.; and he referred the Court to all the relevant authorities, with the view of inducing the Court not to lay down any rule on the question, but to content themselves merely by saying that there was no authority for holding that the place of this collision was within the jurisdiction. The question of what is within the realm of England being one of the matters of which the Court takes judicial notice, we thought it right to ask the Attorney General whether the Crown did or did not claim that particular part of the Bristol Channel where this collision occurred, as being within the territorial jurisdiction of the King; and he replied that the Crown did not. This information was given at the instance of the Court, and for the information of the Court. Given under such circumstances, and on such a subject, it does not in my opinion necessarily bind the Court in the sense that it is under an obligation to accept it.

Having regard, however, to the position created by the information given to the Court by the Attorney General, to absence of authority and to the general trend of the more recent opinion on the question of limiting the width of the fauces terrae to which the rule of territorial jurisdiction should apply, I think the Court ought to be guided by the information given to the Court by the Attorney General, to the extent of saying that they do not consider that there is sufficient authority for supporting the judgment of Hill, J., and that the order appealed from must be set aside and the decision of the learned judge reversed with costs here and below. I confine my judgment to the particular part of the Channel where this collision occurred and to a case where no evidence of any effective occupation is given. (Ibid., p. 323.)

Some members of the court, however, were of the opinion if a decision had been rendered without the statements of the Attorney General, it would have followed the opinion of Hill, J., from which appeal had been taken.

(*Development of aerial rules.*—It is not the intention as evidenced by aerial rules at present accepted to grant to aircraft in time of war the same freedom of movement as that granted naval vessels, but rather to restrict the freedom of aircraft in neutral jurisdiction to a degree more nearly approximating that of military land material and personnel. A compromise has been generally accepted which permits military aircraft to enter neutral jurisdiction when upon and remaining on board vessels of war if vessels of war themselves are permitted to enter.

Previous to 1914 and even during the early days of the World War there had been proposals to limit belligerent activities to land and sea and to prohibit by international agreement in whole or in part the use of aerial space for warfare. This was to a degree accomplished by The Hague Convention of 1899 which for a period of five years prohibited the launching of projectiles and explosives from aircraft. While by strict interpretation the terms of this convention ceased to be binding on the belligerents during the Russo-Japanese War yet the two belligerents mutually observed its provisions till the end of the war. Before 1907 it became clear that the development of aerial navigation had made old rules obsolete. No formal and comprehensive rules existed in 1914 and the practice of the World War showed the need of some regulations.

Submarines in 1916.—There had been in 1916 numerous rumors in regard to contemplated visits of submarines to American waters. The British Government in a note of July 3, 1916, maintained that it was unlikely that such a visit would be for any other purpose than for conducting hostile operations, and set forth its ideas

as to neutral duties. The Government further stated that—

The enemy submarines have been endeavoring for nearly 18 months to prey upon the Allied and neutral commerce, and throughout that period enemy governments have never claimed that their submarines were entitled to obtain supplies from neutral ports. This must have been due to the fact that they thought they would be met with a refusal and that hospitality could not be claimed as of right. The difficulty of knowing the movements or controlling the subsequent action of the submarines renders it impossible for the neutral to guard against any breaches of neutrality after the submarine has left port and justifies the neutral in drawing a distinction between surface ships and submarines. The latter, it is thought, should be treated on the same footing as seaplanes or other aircraft and should not be allowed to enter neutral ports at all. This is the rule prescribed during the present war by Norway and Sweden. Another point of distinction between surface ships and submarines should be borne in mind. A surface vessel demanding the hospitality of a neutral port runs certain inevitable risks; its whereabouts become known and an enemy cruiser can await its departure from port. This and similar facts put a check on the above by belligerent surface ships of neutral hospitality. No such disadvantages limit the use to which the Germans might put neutral ports as bases of supplies for submarine raiders.

For these reasons, in the opinion of His Majesty's Government, if any enemy submarine attempts to enter a neutral port, permission should be refused by the authorities. If the submarine enters it should be interned unless it has been driven into port by necessity. In the latter case it should be allowed to depart as soon as necessity is at an end. In no circumstances should it be allowed to obtain supplies.

If a submarine should enter a neutral port flying the mercantile flag His Majesty's Government are of opinion that it is the duty of the neutral authorities concerned to enquire closely into its right to fly that flag, to inspect the vessel thoroughly and, in the event of torpedoes, torpedo tubes or guns being found on board, to refuse to recognise it as a merchant ship.

In bringing the above to your serious consideration I have the honor to express the confident hope that the United States Government will feel able to agree in the views of His Majesty's Government and to treat submarine vessels of belligerent powers

visiting United States ports accordingly. (1916, Foreign Relations, Supplement, p. 766.)

When the submarine *Deutschland* arrived in Baltimore on July 9, 1916, with a cargo of dyestuffs, it was advisedly treated by the United States as a merchant vessel. The British Government pointed out the dangers of this action.

British position.—By a telegram of the British Secretary of State for Foreign Affairs to the British ambassador at Washington, July 18, 1916, the British position was further set forth in consequence of the treatment of the *Deutschland*.

From point of view of sea power so much depends both now and in the future upon the way in which submarines are to be treated in international law that it seems impossible to leave the controversy at the stage where the United States Government are disposed to let it rest.

The first point to be established is that international law ought not to transfer without modification to submarines, rules and regulations which work fairly well as regards surface vessels. If this be once conceded we may hope to have an international code drawn up which might meet conditions of naval warfare.

It is argued that German commercial submarine carries cargo but no armament and that it should therefore be treated exactly like any other ship which carries cargo but not armament.

On this it must be observed that most formidable part of submarine, namely, its submersibility, is one of its inseparable attributes. Whatever else it carries and for whatever purpose it may nominally have been designed, it cannot divest itself of its most dangerous characteristic. If a belligerent were to use for mercantile purposes a vessel which in every respect was designed and armoured as a battle cruiser, but which carried no guns, everybody would say: "This is only colourably a merchant ship; nine-tenths of work required to convert her into a completely equipped ship of war of most formidable type has already been put into her and cannot be removed. Clearly it is as ship of war that she should be treated."

So it is with the submarine. It is not torpedoes and torpedo tubes which make her what she is. These are weapons which may equally be possessed by a trawler. What really puts her in a class apart and makes it necessary to treat her under special

rules is the indefeasible quality which she possesses of travelling under water. She bears no real resemblance to a liner which in time of war may have a few guns put into her and be turned into an auxiliary cruiser but can never be made a powerful fighting unit. The submersible cargo boat, for all her peaceful appearance, possesses and must always possess qualities which would enable her at very short notice to be converted into a fighting vessel of most formidable kind; her case is therefore exceptional and calls for exceptional treatment.

If this be denied it would seem to follow that unarmed submarines might be constructed in any number in neutral countries and then be armed by belligerent purchaser with necessary torpedo tubes. To take an example, Great Britain would then, if Germany and the United States were at war, be compelled to supply Germany with submarines to be subsequently used in destroying Anglo-American trade. (Ibid., p. 769.)

Allied attitude on submarines, 1916.—Identical memoranda were sent to the Department of State of the United States by the French, British, Russian, Japanese, Italian, and Portuguese Governments in August, 1916, as follows:

In view of the development of submarine navigation, and by reason of the acts which, in present circumstances, may unfortunately be expected from enemy submarines, the Allied Governments consider it necessary, in order not only to safeguard their belligerent rights and the liberty of commercial navigation, but to avoid risks of dispute, to urge neutral governments to take effective measures, if they have not already done so, with a view to preventing belligerent submarine vessels, whatever the purpose to which they are put, from making use of neutral waters, roadsteads, and ports.

In the case of submarine vessels, the application of the principles of the law of nations is affected by special and novel conditions; first, by the fact that these vessels can navigate and remain at sea submerged, and can thus escape all control and observation; and second, by the fact that it is impossible to identify them and to establish their national character, whether neutral or belligerent, combatant or noncombatant, and to remove the capacity for harm inherent in the nature of such vessels.

It may further be said that any place which provides a submarine warship far from its base with opportunity for rest and replenishment of its supplies thereby furnishes such an addi-

tion to its powers that the place becomes in fact, through the advantages which it gives, a base of naval operations.

In view of the state of affairs thus existing, the Allied Governments are of opinion that—

Submarine vessels should be excluded from the benefit of the rules hitherto recognized by the law of nations regarding the admission of vessels of war or merchant vessels into neutral waters, roadsteads, or ports, and their sojourn in them.

Any belligerent submarine entering a neutral port should be detained there.

The Allied Governments take this opportunity to point out to neutral powers the grave danger incurred by neutral submarines in navigating regions frequented by belligerent submarines. (1916, Foreign Relations, Supplement, p. 769.)

Reply of United States.—After reviewing the memorandum of the Allied Powers, the Department of State said on August 31, 1916, that—

In the opinion of the Government of the United States the Allied powers have not set forth any circumstances, nor is the Government of the United States at present aware of any circumstances, concerning the use of war or merchant submarines which would render the existing rules of international law inapplicable to them. In view of this fact and of the notice and warning of the Allied powers announced in their memoranda under acknowledgment, it is incumbent upon the Government of the United States to notify the Governments of France, Great Britain, Russia, and Japan that, so far as the treatment of either war or merchant submarines in American waters is concerned, the Government of the United States reserves its liberty of action in all respects and will treat such vessels as, in its opinion, becomes the action of a power which may be said to have taken the first steps toward establishing the principles of neutrality and which for over a century has maintained those principles in the traditional spirit and with the high sense of impartiality in which they were conceived.

In order, however, that there should be no misunderstanding as to the attitude of the United States, the Government of the United States announces to the Allied powers that it holds it to be the duty of belligerent powers to distinguish between submarines of neutral and belligerent nationality, and that responsibility for any conflict that may arise between belligerent warships and neutral submarines on account of the neglect of a belligerent

to so distinguish between these classes of submarines must rest entirely upon the negligent power." (Ibid., p. 771.)

The Netherlands Government took a position similar to that of the United States on the Allied memorandum. The Norwegian and other governments forbade the entrance of submarines except on surface and flying national flag. The regulations were changed from time to time.

Disregard of neutral obligations.—According to article 1 of XIII Hague Convention respecting the rights and duties of neutral powers in maritime war:

Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a nonfulfillment of neutrality.

The use of neutral waters for warlike purposes would be in violation of the law of nearly all maritime states. It is a right of the neutral that neutral territory be respected. This right does not necessarily imply that the rights of belligerents as regards each other would be entirely changed by the fact of their presence in neutral waters. Belligerents have often acted against each other in neutral waters. The arguments in support of such acts have varied.

Violations of neutrality.—Sometimes there has been violation of neutral jurisdiction without intention or knowledge on the part of the actor. Before the principle of internment was generally recognized, the violation of neutral maritime jurisdiction was often argued to have been necessary as an act of self-defense because otherwise an enemy might take advantage of a sojourn in a neutral port to strengthen his forces in a manner not recognized as within the neutral's power to prevent. There were cases, particularly prior to the Russo-Japanese War 1904–1905, when internment became quite a general practice which shows that belligerents took matters into their own hands.

Acts in marginal sea.—Some have proposed to allow in the marginal sea acts which are not directly hostile in their nature. Such acts might be illustrated by the fueling or provisioning of a belligerent ship. Those who would allow such acts would forbid positive hostilities as the exercise of the right of visit or capture and of course actual firing upon the enemy. Neutrality which would permit the fueling of belligerent forces in neutral waters without restriction would hardly meet the requirements of modern standards. A belligerent force taking on fuel outside of neutral waters would be liable to attack from the opposing forces and would have to protect itself accordingly. Within neutral waters where hostilities between the belligerents are forbidden fueling might go on almost as in time of peace. The taking on of the supply of fuel permitted under the rules of neutrality has in general the limitation that it is permitted in order to enable the ship to keep the sea. The proposition of some of the advocates of the doctrine which would allow fueling at any time without restriction within neutral waters beyond the port limits would uphold action on the part of a belligerent which in effect constitutes the neutral waters a base. Colliers and fuel ships might await in safety in neutral waters the arrival of a fleet and the fleet might return repeatedly for fueling.

It is admitted that a neutral could not ordinarily and should not be required to exercise the same measures to prevent violations of neutrality in remote marginal seas and in ports. The supervision should be such as could reasonably be exercised without unduly throwing the burdens of war on the neutral.

The action of a belligerent in using neutral jurisdiction for carrying on movements or undertakings which are of hostile nature is contrary to the obligations owed by the belligerent to the neutral state. It is the aim of the first article of The Hague Convention XIII to prohibit such conduct. The responsibility is placed upon the

belligerent to abstain from acts which knowingly permitted by a neutral state would constitute a nonfulfillment of their neutrality. The nature of the obligation may be seen from the comment in the report upon this Article I submitted at The Hague Conference in 1907.

Le principe est applicable à la guerre continentale comme à la guerre maritime, et il ne faut pas s'étonner que le Règlement élaboré par la Deuxième Commission au sujet des droits et des devoirs des Etats neutres sur terre commence par cette disposition: "Le territoire des Etats neutres est inviolable."

D'une manière générale, les belligérants doivent s'abstenir dans les eaux neutres de tout acte qui, s'il était toléré par l'Etat neutre, constituerait un manquement à la neutralité. Il importe de remarquer, dès à présent, qu'un devoir du neutre ne correspond pas nécessairement à un devoir du belligérant et cela est conforme à la nature des choses. On peut imposer au belligérant l'obligation absolue de s'abstenir de certains actes dans les eaux de l'Etat neutre; il lui est aisé, et, dans tous les cas, possible de satisfaire à cette obligation, qu'il s'agisse des ports ou des eaux territoriales. On ne peut, au contraire, imposer à l'Etat neutre l'obligation de prévenir ou de réprimer tous les actes que voudrait faire ou ferait un belligérant, parce que très souvent l'Etat neutre ne sera pas en situation de remplir une pareille obligation. Il peut ne pas savoir tout ce qui se passe dans ses eaux et il peut n'être pas en état de l'empêcher. Le devoir n'existe que dans la mesure où on peut le connaître et le remplir. Cette observation reçoit son application dans un certain nombre de cas.

On a parfois à se demander s'il y a lieu de distinguer entre les ports et les eaux territoriales: la distinction se comprend en ce qui concerne les devoirs du neutre, qui ne peut être au même degré responsable de ce qui se passe dans les ports soumis à l'action directe de ses autorités ou dans ses eaux territoriales, sur lesquelles il n'a souvent qu'un faible contrôle; la distinction ne se comprend pas pour le devoir du belligérant, qui est le même partout. (Deuxième Conférence de la Paix, Tome I, p. 297.)

Opinion of Mr. Adams on supply of coal.—The opinion of Mr. Charles Francis Adams before the Geneva Arbitration Tribunal covered the general subject of supply of coal. The principles enunciated may for the most part apply to the supply of any kind of fuel. As the summary presented by Mr. Adams covers various phases

of the question of use of base for supplies, it may be somewhat fully presented:

This question of coals was little considered by writers on the law of nations, and by sovereign powers, until the present century. It has become one of the first importance, now that the motive-power of all vessels is so greatly enhanced by it.

The effect of this application of steam-power has changed the character of war on the ocean, and invested with a greatly preponderant force those nations which possess most largely the best material for it within their own territories, and the greatest number of maritime places over the globe where deposits may be conveniently provided for their use.

It is needless to point out the superiority in this respect of the position of Great Britain. There seems no way of discussing the question other than through this example. Just in proportion to these advantages is the responsibility of that country when holding the situation of a neutral in time of war.

The safest course in any critical emergency would be to deny altogether to supply the vessels of any of the belligerents, except perhaps when in positive distress.

But such a policy would not fail to be regarded as selfish, illiberal, and unkind by all belligerents. It would inevitably lead to the acquisition and establishment of similar positions for themselves by other maritime powers, to be guarded with equal exclusiveness, and entailing upon them enormous and continual expenses to provide against rare emergencies.

It is not therefore either just or in the interest of other powers, by exacting severe responsibilities of Great Britain in time of war, to force her either to deny all supplies, or, as a lighter risk, to engage herself in war.

It is in this sense that I approach the arguments that have been presented in regard to the supply of coals given by Great Britain to the insurgent American steamers as forming a base of operations.

It must be noted that, throughout the war of four years, supplies of coal were furnished liberally at first, and more scantily afterward, but still indiscriminately, to both belligerents.

The difficulty is obvious how to distinguish those cases of coals given to either of the parties as helping them impartially to other ports, from those furnished as a base of hostile operations.

Unquestionably, Commodore Wilkes, in the *Vanderbilt*, was very much aided in continuing his cruise at sea by the supplies obtained from British sources. Is this to be construed as getting a base of operations?

It is plain that a line must be drawn somewhere, or else no neutral power will consent to furnish supplies to any belligerent whatever in time of war.

So far as I am able to find my way out of this dilemma, it is in this wise:

The supply of coals to a belligerent involves no responsibility to the neutral, when it is made in response to a demand presented in good faith, with a single object of satisfying a legitimate purpose openly assigned.

On the other hand, the same supply does involve a responsibility if it shall in any way be made to appear that the concession was made, either tacitly or by agreement, with a view to promote or complete the execution of a hostile act.

Hence I perceive no other way to determine the degree of the responsibility of a neutral in these cases, than by an examination of the evidence to show the *intent* of the grant in any specific case. Fraud or falsehood in such a case poisons everything it touches. Even indifference may degenerate into willful negligence, and that will impose a burden of proof to excuse it before responsibility can be relieved.

This is the rule I have endeavored to apply in judging the nature of the cases complained of in the course of this arbitration. (Papers relating to the treaty of Washington, vol. 4, p. 148.)

Opinion of Sir Alexander Cockburn.—The position of Mr. Adams was criticised by one of the British representatives, sitting on the tribunal. He said:

But a novel and, to my mind, most extraordinary proposition is now put forward, namely, that if a belligerent ship is allowed to take coal, and then to go on its business as a ship of war, this is to make the port from which the coal is procured "a base of naval operations," so as to come within the prohibition of the second rule of the treaty of Washington.

We have here another instance of an attempt to force the words of the treaty to a meaning which they were never—at least so far as one of the contracting parties is concerned—intended to bear. It would be absurd to suppose that the British government, in assenting to the rule as laid down, intended to admit that whenever a ship of war had taken in coal at a British port and then gone to sea again as a war-vessel, a liability for all the mischief done by her should ensue. Nor can I believe that the United States Government had any such *arrière pensée* in framing the rule; as, if such had been the case, it is impossible to suppose that they would not have distinctly informed the

British government of the extended application they proposed to give to the rule.

The rule of international law, that a belligerent shall not make neutral territory the base of hostile operations, is founded on the principle that the neutral territory is inviolable by the belligerent, and that it is the duty of the neutral not to allow his territory to be used by one belligerent as a starting-point for operations against the other. This is nowhere better explained, as regards ships of war, than by M. Ortolan, in the following passage:

“Le principe général de l’inviolabilité du territoire neutre exige aussi que l’emploi de ce territoire reste franc de toute mesure ou moyen de guerre, de l’un des belligérants contre l’autre. C’est une obligation pour chacun des belligérants de s’en abstenir; c’est aussi un devoir pour l’état neutre d’exiger cette abstention; et c’est aussi pour lui un devoir d’y veiller et d’en maintenir l’observation à l’encontre de qui que ce soit. Ainsi il appartient à l’autorité qui commande dans les lieux neutres, où des navires belligérants, soit de guerre, soit de commerce, ont été reçus, de prendre des mesures nécessaires pour que l’asile accordé ne tourne pas en machination hostile contre l’un des belligérants; pour empêcher spécialement qu’il ne devienne un lieu d’où les bâtiments de guerre ou les corsaires surveillent les navires ennemis pour les poursuivre et les combattre, et les capturer lorsqu’ils seront parvenus au-delà de la mer territoriale. Une de ces mesures consiste à empêcher la sortie simultanée des navires appartenant à des puissances ennemies l’une de l’autre.¹”

It must be, I think, plain that the words “base of operations” must be accepted in their ordinary and accustomed sense, as they have hitherto been understood, both in common parlance and among authors who have written on international law. Now, the term “base of warlike operations” is a military term, and has a well-known sense. It signifies a local position which serves as a point of departure and return in military operations, and with which a constant connection and communication can be kept up, and which may be fallen back upon whenever necessary. In naval warfare it would mean something analogous—a port or water from which a fleet or a ship of war might watch an enemy and sally forth to attack him, with the possibility of falling back upon the port or water in question, for fresh supplies or shelter, or a renewal of operations. (Papers relating to treaty of Washington, vol. 4, p. 422.)

¹ *Diplomatie de la mer*, vol. i, p. 291.

Later speaking of the supply of coal the *Shenandoah* was allowed to take in Melbourne, Sir Alexander Cockburn said:

But it is said that by taking in coal at Melbourne, with the ulterior purpose of making war on the whaling vessels of the United States, this vessel was enabled to make the port of Melbourne a "base of naval operations."

As I have already observed, when the law on this subject was under discussion, the application of such a rule in favor of the United States to the prejudice of Great Britain would be a flagrant injustice, seeing that, as I then showed, ships of war of the United States obtained many thousand tons of coal, under exactly the same circumstances, that is to say, when they had particular "naval operations" in immediate view. If this doctrine is to hold, every time a vessel, having a particular belligerent purpose in view, takes in coal, and proceeds on such purpose, the port will at once be converted into a base of naval operations. The same reasoning would of course apply, and in the same degree, to repairs.

This proposition is, to my mind, utterly unreasonable, as being altogether inconsistent with any idea that ever has been, or properly can be, attached to the term "base of operations;" and is, moreover, in the most flagrant degree unjust, if it is to have the effect of imposing on the neutral any responsibility to the other belligerent. For it is obviously inconsistent with common justice that the neutral state shall suffer for that to which it is not only no party, but of which it has also no knowledge. By the common practice of nations, as well as by the regulations of the government, a belligerent vessel is allowed to have the benefit of necessary repairs, and to take a supply of coal without the local government being entitled to inquire into her ulterior destination. No such inquiry is prescribed by the regulations in question, or by those made by any other nation; nor has any publicist ever suggested that such a proceeding should be adopted. No such inquiry could, with propriety, be made; nor could the commander of the ship be called upon to answer it if made. The knowledge of his intended course might expose him to the attack of an enemy. No such question, so far as I am aware, was ever put to a belligerent vessel during the whole course of the war. None such was ever put to a ship of the United States when applying for coal at a British port. This being so, to say that, the local government being in ignorance of the destination of the vessel, a responsibility is to be incurred because the belligerent, in obtaining this accommodation, has an ulterior operation in view, as to which, by

some violent distortion of language, the port may be said to be thus rendered a base, but of which ulterior operation the neutral knows nothing, appears to me to be an outrage not only of the first principles of justice, but also upon the plainest dictates of common sense. (Ibid., p. 498.)

Consideration in 1912.—The Naval War College considered the question of base with particular reference to coaling in the conferences of 1912. It was stated that under the circumstances specified where one belligerent government protests against furnishing coal to naval colliers of the opponent in a neutral port, the neutral state should heed the request. In this case it was known that such coal had been furnished and the protest was against the continuance of the practice. In referring to the conception of base under such circumstances it was said:

The word "base" had been used in many senses. It is often coupled with some other word which modifies its meaning. The most common expression is "base of communications," though "base of supplies," "base of communications" and other expressions are used. The modifying words are differently interpreted.

The use of neutral territory by a belligerent as a base in the sense of a place in which a belligerent may habitually prepare to wage war more effectively against his enemy, fit out expeditions, take refuge, or establish a rendezvous, is usually regarded as contrary to, or a violation of neutrality. The Hague Convention relative to the Rights and Duties of Neutral Powers in Maritime War provides at the outset that the belligerent shall not throw all obligation upon the neutral, saying:

"Article I. Belligerents are bound to respect the sovereign rights of neutral powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any power, constitute a nonfulfillment of neutrality." (1912, Naval War College, International Law Situations, p. 153.)

Danish order, 1912.—In the Danish order of December 20, 1912, there were provisions which were quite in detail in regard to the use by belligerents of national waters. Even the possibility of the establishing of fuel depots in Danish waters was foreseen. In part 4, paragraph 2, it was provided:

It is prohibited to organize fuel depots on Danish territory or on vessels staying in Danish territorial waters. (1916, Naval War College, International Law Topics, p. 52.)

Opinion of Professor Holland.—Professor Holland of Oxford University, in 1913, president of the Institute of International Law, wrote during the Russo-Japanese War of 1904–5 in regard to furnishing coal to the Russian fleet. He mentions that ordinary commerce between neutrals and belligerents is not terminated by war, and that this commerce even in articles of contraband may be subject only to the risks of war. He further says:

It by no means follows that British shipowners may charter their vessels "for such purposes as following the Russian fleet with coal supplies." Lord Lansdowne's recent letter to Messrs. Woods, Taylor and Brown is explicit to the effect that such conduct is "not permissible." Lord Lansdowne naturally confined himself to answering the question which had been addressed by those gentlemen to the Foreign Office; but the reason for his answer is not far to seek. The unlawfulness of chartering British vessels for the purpose above mentioned is wholly unconnected with the doctrine of contraband, but is a consequence of the international duty, which is incumbent on every neutral State, of seeing that its territory is not made a base of belligerent operations. The question was thoroughly threshed out as long ago as 1870, when Mr. Gladstone said in the House of Commons that the Government had adopted the opinion of the law officers—

"That if colliers are chartered for the purpose of attending the fleet of a belligerent and supplying it with coal, to enable it to pursue its hostile operations, such colliers would, to all practical purposes, become store-ships to the fleet, and would be liable, if within reach, to the operation of the English law under the (old) Foreign Enlistment Act."

British colliers attendant on a Russian fleet would be so undeniably aiding and abetting the operations of that fleet as to give just cause of complaint against us to the Government of Japan. The British shipper of coal to a belligerent fleet at sea, besides thus laying his Government open to a charge of neglect of an international duty, lays himself open to criminal proceedings under the Foreign Enlistment Act of 1870. By section 8 (3) and (4) of that Act, "any person within H. M. Dominions" who (subject to certain exceptions) equips or despatches any ship, with intent, or knowledge, that the same will be employed in the

military or naval service of a foreign State, at war with any friendly State, is liable to fine or imprisonment, and to the forfeiture of the ship. By section 30, "naval service" covers "user as a store-ship," and "equipping" covers furnishing a ship with "stores or any other thing which is used in or about a ship for the purpose of adapting her for naval service." Our Government has, therefore, ample powers for restraining, in this respect, the use of its territory as a base. It has no power, had it the wish (except for its own protection, under a different statute), to restrain the export of contraband of war.

It would tend to clearness of thought if the term "contraband" were never employed in discussions with reference to prohibition of the supply of coal to a belligerent fleet at sea. (Letters on War and Neutrality, p. 93.)

Award of the tribunal.—The award of the Geneva Tribunal referring to coaling stated that "in order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters, as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character." (1 Moore, International Arbitrations, p. 574.)

Restatement of rule.—The rule of the treaty of Washington, 1871, in regard to the use of a neutral port or waters as a base of operations was restated in the American case as follows:

The second Rule provides that a neutral government is bound not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

A question has been raised whether this rule is understood to apply to the sale of military supplies or arms in the ordinary course of commerce. The United States do not understand that it is intended to apply to such a traffic. They understand it to apply to the use of a neutral port by a belligerent for the *renewal* or *augmentation* of such military supplies or arms for the *naval operations* referred to in the rule. Taken in this sense, the United States maintain that the same obligations are to be

found, (expressed in other words,) first, in the Foreign Enlistment Act of 1819; and, secondly, in the instructions to the naval forces of Great Britain during the rebellion.

The Tribunal of Arbitration will not fail to observe the breadth of this rule.

The ports of waters of the neutral are not to be made the base of naval operations by a belligerent. Vessels of war may come and go under such rules and regulations as the neutral may prescribe; food and the ordinary stores and supplies of a ship, not of a warlike character, may be furnished without question, in quantities necessary for immediate wants; the moderate hospitalities which do not infringe upon impartiality may be extended; but no act shall be done to make the neutral port a base of operations. Ammunition and military stores for cruisers cannot be obtained there; coal cannot be stored there for successive supplies to the same vessel, nor can it be furnished or obtained in such supplies; prizes cannot be brought there for condemnation. The repairs that humanity demand can be given, but no repairs should add to the strength or efficiency of a vessel, beyond what is absolutely necessary to gain the nearest of its own ports.

In the same sense are to be taken the clauses relating to the renewal or augmentation of military supplies or arms and the recruitment of men. As the vessel enters the port, so is she to leave it, without addition to her effective power of doing injury to the other belligerent. If her magazine is supplied with powder, shot, or shells; if new guns are added to her armament; if pistols, or muskets, or cutlasses, or other implements of destruction, are put on board; if men are recruited; even if, in these days when steam is a power, an excessive supply of coal is put into her bunkers, the neutral will have failed in the performance of its duty. (1, Papers, treaty of Washington, p. 70.)

Supplies.—In the discussions during the Geneva Arbitration there were many claims and counterclaims. The United States (thought) that—

British territory was, during the whole struggle, the base of the naval operations of the insurgents. The first serious fight had scarcely taken place before the contracts were made in Great Britain for the *Alabama* and the *Florida*. The contest was nearly over when Waddell received his orders in Liverpool to sail thence in the *Laurel* in order to take command of the *Shenandoah* and to visit the Arctic Ocean on a hostile cruise.

There also was the arsenal of the insurgents, from whence they drew their munitions of war, their arms, and their supplies. It

is true that it has been said, and may again be said, that it was no infraction of the law of nations to furnish such supplies. But, while it is not maintained that belligerents may infringe upon the rights which neutrals have to manufacture and deal in such military supplies in the ordinary course of commerce, it is asserted with confidence that a neutral ought not to permit a belligerent to use the neutral soil as the main if not the only base of its military supplies, during a long and bloody contest, as the soil of Great Britain was used by the insurgents. (1, Papers relating to the treaty of Washington, p. 125.)

British reply.—To the statement made by the United States as to the interpretation of the second rule of the treaty of Washington the British countercase makes reply:

According to this interpretation a neutral government which should suffer a belligerent cruiser to effect repairs beyond what are absolutely necessary for gaining the nearest of its own ports, or to receive more coal than would be enough for the same purpose, would commit a breach of neutral duty. It may, indeed, sometimes be found convenient by neutral powers to impose restrictions of this nature, more or less stringent, on the armed vessels of belligerents admitted into their ports; and this was done by Great Britain during the civil war. But such restrictions were not then, and are not now, dictated by any rule of international obligation. Were they to become such, and were the obligation to be construed against the neutral with the breadth and rigor for which the United States contend, it may be feared that neutral powers would rarely be secure against complaints and demands for compensation on the part of one belligerent or another.

Having constantly during the war used British ports as places of resort for its own cruisers, and having repeatedly obtained for them therein successive supplies of coal, which were consumed, not in returning home, but in cruising, the Government of the United States now appears to represent this very act as a breach of neutral duty, and to hold Great Britain liable for any cases in which confederate vessels may have succeeded in obtaining similar facilities.

This question, however, does not regard Great Britain alone. The Government of the United States has plainly declared that it regards these rules as no more than a statement of previously

established rules of international law.² So far as regards the second rule Her Britannic Majesty's government concurs in this view. The expressions upon which the United States rely belong to a class in common use among publicists, who, in attempting to define the duties of neutrality, are accustomed to employ these words or others equivalent to them, and of not less extensive meaning. Thus the phrase, "base of naval operations," employed in this connection, denotes the use of neutral territory by a belligerent ship as a station or point of departure, where she may await and from whence she may attack her enemy. That these expressions have not hitherto received the construction which the United States would put upon them is certain. Whether they are to receive it in future is a question which concerns not Great Britain only, but all other powers which may hereafter find themselves neutral in maritime warfare. (Two papers, treaty of Washington, p. 221.)

Self-defense, the "Caroline."—In 1841, Mr. Webster, Secretary of State, in a communication to Mr. Fox, British Minister, said:

It is admitted that a just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both. But the extent of this right is a question to be judged of by the circumstances of each particular case; and when its alleged exercise has led to the commission of hostile acts within the territory of a power at peace, nothing less than a clear and absolute necessity can afford ground of justification. (6, Webster's Works, p. 255.)

Further, referring to the destruction of the *Caroline* by the British, Mr. Webster said:

It will be for that government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. (Ibid., p. 261.)

² Case of the United States, pp. 148, 149. See also p. 162, and the President's message to Congress, Dec. 4, 1871. "The contracting parties in the treaty have undertaken to regard as between themselves certain principles of public law, for which the United States have contended from the commencement of their history. They have also agreed to bring those principles to the knowledge of the other maritime powers, and to invite them to accede to them."

While Mr. Webster's position in 1844 is taken as a correct statement of the law, the strain of war has put it to severe test. Naturally writers in belligerent countries during and immediately after the World War were disposed to find reasons for supporting acts of their national or allied forces. This was often manifest in regard to the attitude toward new agencies of warfare such as the submarine and aircraft, but the principles of law are not dependent upon the agencies as has been shown from early times when new forms of weapons were viewed with disfavor or even prohibited. The early object of war to conquer the enemy was gradually superseded by the object of bringing the enemy to terms, and later to bring the enemy to terms with the least loss of life and property, and then to bring the enemy to terms with the least loss of life and property without unnecessary suffering.

Self-defense, general.—As a basis of international law the right of states to exist is acknowledged. A state must therefore have the right to defend its existence. In defending its existence, it must recognize the right of other states to exist. As between belligerents in time of war this mutual recognition of the right of existence is temporarily suspended except as involved in conduct conformable to the laws of war. The existence of war should not, however, imperil the existence of states which are neutral and not parties to the war. That neutral states may be inconvenienced by war is entirely possible and that neutral and belligerent rights may at times be in conflict is also possible. This is recognized in the interference with commerce as in blockade, contraband, and other admitted war practices.

Quite different is an act of war within neutral jurisdiction. Such acts are prohibited because a neutral may be responsible for acts which take place within its jurisdiction, and in recent years it has been held that a neutral state is bound to use due diligence to prevent such

acts. Due diligence has been interpreted as the use of the means at the disposal of the neutral state.

If in the presence of an adequate neutral force of a coastal state, a much inferior belligerent force should be permitted to attack or to capture in the neutral jurisdiction an opponent's merchant vessel, the neutral's duty would not be fulfilled. If, however, on a remote neutral coast such an attack or capture should be made, the neutral obligation might be slight. In both cases the belligerent's obligation would be the same. If a belligerent submarine should suddenly appear in neutral waters in a position which apparently immediately threatened its opponent's fleet, there might be a ground for action against the submarine as in self-defense.

SOLUTION

(a) (1) The aircraft of X should not attack the submarine of Y unless on grounds other than mere presence of the submarine in the strait of R.

(2) The presence of the cruiser of State R would make it more imperative that any attack by the aircraft of X upon the submarine of Y should be based upon some hostile act of the submarine of Y.

(b) State R should intern the vessels of State X if they are or have been using the waters of R as a base.

Conclusions.—(a) From practice of states and from accepted rules at present (1) a belligerent is under obligation to refrain within neutral jurisdiction from any act which, if knowingly permitted by a neutral, would be a nonfulfillment of neutrality; (2) any warlike act against an enemy within neutral jurisdiction is a violation of international law; (3) reparation for such an act is due to the neutral state; (4) the neutral may be under obligation to the injured belligerent if due diligence has not been used though; (5) the act may be valid as between the belligerents.

As to Situation II it may be said that (a) (1) the submarine of State Y is conforming to the general requirement that submarines in neutral waters navigate upon

the surface. The aircraft of State X is flying within neutral jurisdiction which in general is contrary to neutrality. The submarine of Y if conforming to the laws of R has the same right in the strait as the fleet of X. The fact that it is in a favorable position to attack the fleet of X gives the force of X no right to attack the submarine of Y nor does the submarine have any right to attack the fleet of X.

(2) The fact that a cruiser of State R is near would not change the relative rights of the belligerents, but would be an evidence that State R proposed to maintain its neutrality and that the forces of X and Y were to that degree more secure as regards each other.

(b) This land of State R consisting of islands not more than 6 miles apart in the area in which the vessels of State X are refueling incloses open water 7 miles from any of the islands.

It has been generally held that such water is analogous to a bay and the surrounding state has over it exclusive jurisdiction.

Consequently the refueling is taking place within the jurisdiction of State R.

The aircraft Y can not lawfully traverse the air above this area but if it makes its observation from the high seas, it commits no violation of R's neutrality and even if it does, that in no way changes the obligations of State R.

The refueling to peace capacity of full bunkers not more often than once in three months in a neutral port is usually permitted, but under supervision of port authorities.

At the point 7 miles from any land, the port authorities, if any, would not ordinarily be exercising supervision because the commercial vessel would not have entered port and would not have deposited its papers.

The demand of the aircraft of State Y is correct, and State R should intern the vessels of State X if they are or have been using its waters as a base.

SITUATION III

BELLIGERENCY AND MARITIME JURISDICTION

States X and Y are at war. Other states neutral.

(a) The *Xerxes*, a cruiser of State X, is refueling from the *Petro*, a tanker, in quiet water more than 3 miles from the coast of State R, the only state within 100 miles, but inside and more than 3 miles from a reef off the coast of State R. The reef is generally submerged, but certain rocks are exposed at low tide. State Y protests to State R. State R takes no action upon the protest. A submarine, *Y 50*, of State Y, then sinks the *Petro*. The *Y 50* is brought to the surface by depth bombs from the *Xerxes*, but succeeds in beaching itself on a reef less than 3 miles from State R. The *Xerxes* takes off the crew of the *Y 50* and makes them prisoners of war.

Have States X, Y, and R grounds for protests?

(b) Later the *Xenophon*, a companion ship of the *Xerxes*, runs upon the reef at a point $6\frac{1}{2}$ miles from any point of State R. A salvage ship flying the flag of and belonging to a corporation of State R is endeavoring to get the *Xenophon* off. A submarine of State Y, the *Y 51* appears and demands that salvaging operations cease, that the crew of the *Xenophon* be taken on board the salvaging ship as the *Y 51* is about to destroy the *Xenophon* by torpedo fire. A cruiser of State R is standing by, and the *Xenophon's* armament and boats are intact. What action?

SOLUTION

(a) As neutral State R takes no action, the action of submarine *Y 50* is lawful. The defense of cruiser

Xerxes is lawful, but the taking of the crew of the beached *Y 50* as prisoners of war is not lawful.

State X has no ground for valid protest.

State Y may protest against the taking of the crew of *Y 50* as prisoners of war.

State R may protest against the action of the *Xerxes* in entering its waters and making the crew of *Y 50* prisoners of war.

(b) The place of salvaging is in the high sea and the salvaging operations are lawful. The salvaging vessel is under obligation to cease operations but under no obligation to take the crew of the *Xenophon* on board. The relative weakness of the submarine *Y 51* gives it no right to demand exceptional services from the salvaging vessel. The *Xenophon's* armament and boats being intact, the conditions for which the Hague-Geneva Convention provides have not arisen, and the salvaging vessel may decline to take any action except to discontinue salvaging operations unless upon agreement of all parties.

Situations I and II, 1931.—In Situations I and II above, many citations equally applicable to Situation III are given. These are not repeated in the following pages but may be found under the appropriate heading from the index.

Discussions at Naval War College.—The problem of taking on fuel for vessels of war in neutral jurisdiction has been considered in various aspects at this Naval War College. In the early part of the nineteenth century, it was usually some aspect of coaling that was discussed. In 1901 coal as contraband and the supply to belligerent ships was mentioned. In 1902 the amount that might be taken was considered. In 1903 the proposed Naval War Code was before the conference but in 1904 the taking of coal from supply ships arose. In 1905 the question was "what are the circumstances under which food stuffs and coal, and raw material, such as cotton, can be declared to be contraband?" The supplying of fuel or oil

to belligerent vessels in neutral ports was one of the topics in 1906. The status of a collier in a foreign port and the nature of collier service were topics in 1907. Coaling in neutral waters became the object of further attention in 1908 in consequence of the provisions of The Hague Conventions of 1907 and the discussions at The Hague Conference of 1907. In 1909 the Declaration of London brought many problems of neutral rights and obligations before the conference, and in 1910 one of the situations related primarily to coaling within neutral jurisdiction. Such recurrence of the topic of coaling gives evidence of the problems which centered about taking on fuel in the first decade of the nineteenth century.

Geneva Arbitration, 1871.—The Geneva Arbitration Tribunal under the treaty of Washington, May 8, 1871, relating particularly to the Alabama claims, gave much attention to coaling as coal was at that time a great source of motive power. Reference has often been made to the arguments and discussion before the tribunal in the publications of the Naval War College, but it seems desirable to repeat some of these, as the award of the tribunal and the articles of the treaty of Washington have become the basis of modern neutrality proclamations.

The rules of the treaty of Washington which relate to this matter were as stated in Article VI, that—

A neutral Government is bound—

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties. (17 U. S. Stat. 863.)

Early American cases.—As early as 1793 the question of capture in American waters arose. The French frigate *Embuscade* captured the British ship *Grange* in the Delaware Bay. The Attorney General advised the Government that the Bay was within the jurisdiction of the United States and that the *Grange* should be released and the *Grange* was released. (Amer. State Papers, 1 Foreign Relations, p. 148.) Jefferson at this period recognized that the obligation to maintain neutrality extended to 3 miles. The neutrality act of June 5, 1794, gave for the United States clear principles of conduct which in later years have been widely followed. Article VII of the Jay treaty mentions specifically the satisfaction of claims of British merchants and others who have "sustained loss and damage by reason of the capture of their vessels and merchandise, taken within the limits and jurisdiction of the States." Under this article the British brig *Pilgrim*, captured October 6, 1793, within 2½ miles from the United States, was adjudged to be restored.

During the War of 1812 there were several cases in which belligerents made use of territorial waters in hostilities. The American frigate *Essex* was attacked by the British frigate *Phoebe* and sloop *Cherub* in 1814 in the territorial waters off Valparaiso and the *Levant*, an American prize, was chased into Port Praya and captured while there. The American privateer *General Armstrong* was destroyed by a British squadron in the same year in the port of Fayal. Such acts led to vigorous protests on the part of the United States to the neutral states. The case of the *General Armstrong* was made the basis of a long pending claim against Portugal which was at length referred to Louis Napoleon, who in 1852 rendered an award to the effect that Portugal

was not liable as the local authorities had not been called upon to furnish protection, the American privateer having fired upon a British longboat which the captain of the *General Armstrong* maintained was planning to board the privateer. The claim came before the Court of Claims of the United States on the ground that it was not properly placed before Louis Napoleon and was disallowed. Congress subsequently granted nearly \$71,000 to the claimant as Senator Platt recognizing the patriotism of the personnel of the *General Armstrong*, said also "it appeals strongly to the imagination." In the case of the *Anna*, which the British had captured within 3 miles of the coast of the United States off the mouth of the Mississippi and brought to England, Sir William Scott (Lord Stowell) said in 1805:

The conduct of the captors has on all points been highly reprehensible. * * * In such a case it would be falling short of the justice due to the violated rights of America, and to the individuals who have sustained injury by such misconduct, if I did not follow up the restitution which has passed on the former day, with a decree of costs and damages. (5 C. Robinson Admiralty Reports, p. 373.)

The U. S. S. *Wachusett* on October 7, 1864, captured in the harbor of Bahia, Brazil, and took to the United States the Confederate cruiser *Florida*. Brazil demanded reparation. The President disavowed the act, suspended the commander of the *Wachusett*, dismissed the consul who had advised the capture, ordered a salute of the Brazilian flag, released the crew of the *Florida* and the Secretary of State declared the capture of the *Florida* to be "an unauthorized, unlawful, and indefensible exercise of the naval force of the United States, within a foreign country, in defiance of its established and duly recognized Government."

It is clear that hostilities within neutral maritime jurisdiction have been increasingly regarded as without the sanction of law. The obligations of a neutral to prevent even the use of its territory as a base is similarly evident

and was brought out clearly in the *Alabama* award and in neutrality proclamations since 1871.

The "Twee Gebroeders."—One of the early cases in regard to belligerent use of territorial waters, arose in consequence of a claim that on July 14, 1799, four Dutch ships had been taken while they were in neutral territorial waters. This case relating particularly to the *Twee Gebroeders* came before the British Prize Court in 1800.

It is said that the ship was, in all respects, observant of the peace of the neutral territory; that nothing was done by her which could affect the right of territory, or from which any inconvenience could arise to the country within whose limits she was lying, inasmuch as the hostile force which she employed was applied to the captured vessel lying out of the territory. But that is a doctrine that goes a great deal too far. I am of opinion that no use of a neutral territory, for the purposes of war, is to be permitted. I do not say remote uses, such as procuring provisions and refreshments, and acts of that nature, which the law of nations universally tolerates; but that no proximate acts of war are in any manner to be allowed to originate on neutral grounds; and I cannot but think that such an act as this, that a ship should station herself on neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted. For, suppose that even a direct hostile use should be required to bring it within the prohibition of the law of nations, nobody will say that the very act of sending out boats to effect a capture is not itself an act directly hostile, not complete, indeed, but inchoate, and clothed with all the characters of hostility. If this could be defended, it might as well be said that a ship lying in a neutral station might fire shot on a vessel lying out of the neutral territory; the injury in that case would not be consummated nor received on neutral ground; but no one would say that such an act would not be an hostile act, immediately commenced within the neutral territory. And what does it signify to the nature of the act, considered for the present purpose, whether I sent out a cannon-shot which shall compel the submission of a vessel lying at two miles distance, or whether I send out a boat armed and manned, to effect the very same thing at the same distance? It is in both cases the direct act of the vessel lying in neutral ground. The act of hostility actually begins,

in the latter case, with the launching and manning and arming the boat that is sent out on such an errand of force. (*The Twee Gebroeders*, 3 C. Robinson, p. 162.)

German ordinance, 1909.—The German ordinance of September 30, 1909, made provisions in regard to the right of capture which would in general apply to hostilities in neutral waters as follows:

Art. 3. The right of capture does not hold—

(a) Within neutral waters; i. e., within a sea area, 3 sea miles wide, measured from the low-water coast line, bordering the coast and the islands and indentations appertaining thereto. As appertaining are: Islands which are not farther than 6 miles distant from one of the mainland coasts of the same State; indentations whose coast is exclusively in the possession of the neutral State and whose opening is 6 sea miles or less wide.

(b) Within those waters which are by convention closed to operations of war or to ships of war. These are:

“(α) The Suez Canal, including its entrance harbors and a sea area of 3 sea miles beyond them. (Art. 4, sec. 1, of the treaty of Constantinople of October 29, 1888.)

“(β) The Bosphorus and the Dardanelles, so far as Turkey is not herself a belligerent: (Treaty of London concerning narrow seas of July 13, 1841; art. 10 of the Peace of Paris of March 30, 1865, and Appendix I thereto; art. 2 of the treaty of London of March 13, 1871; art. 63 of the treaty of Berlin of July 13, 1878.)

“(γ) The waters of Corfu and Paxe, so far as no other power than Greece, Great Britain, France, Russia, Austria-Hungary, and Germany are parties to the war. (Art. 2. of the treaty of London of November 14, 1863, and art. 2 of the treaty of London of March 24, 1864.)

“(δ) The mouths of the Danube. (Art. 42 of the treaty of Berlin of July 13, 1878.)

“(ε) The mouths of the Congo and Niger and the coastal waters adjacent thereto. (General agreement of the Berlin conference of February 26, 1888, arts. 25 and 33.) The right of capture may also be no further exercised when a merchant vessel during the course of pursuit or while under visit and search reaches the waters referred to in (a) and (b).” (1925, Naval War College, International Law Documents, p. 3.)

The German Prize Code of 1916 (art. 3) states that “a war vessel may, of course, pass through neutral terri-

torial waters in order to hold up a ship outside these limits."

Norwegian coast.—While this Situation III refers to no specific coast and while the same type of coast formation so far as jurisdictional problems may arise in areas of shallow waters or where coral reefs prevail, the Norwegian coast has many striking characteristics. These were mentioned in a report presented by a Royal committee in 1924. The committee said :

The coastal waters of Norway with their outlying banks are characteristic and quite different from those of other European countries. They also vary greatly in different parts of the country. This remarkable character of the coast is due to the fact that Norway is a mountainous country—an irregular mass of rock—furrowed and cleft by an infinite number of gullies and valleys. The coast line winds in and out of bays and fjords, which in many places cut very deeply into the mainland. Thus the coast is highly variable and this variability is intensified by the numerous large and small islands, islets, holms and rocks that lie strewn at various distances from the mainland proper. Only two comparatively short stretches of coast are without their skerry guard, viz, Jaederen in the southwest, and east Magerøen on the northern coast. Along these stretches of coast that possess a skerry guard, i. e. the predominant part of the coast, tall pointed mountain tops rise from the bottom of the sea nearly up to the surface of the water. These hidden rocks or shallows, with dividing furrows and channels, cause still greater variability in the formation of the sea floor. As a rule the latter descends from the shore in terraces with steep, mountainous precipices. The formation common to other countries, viz. banks sloping evenly from the shore to an outer ridge of banks, is very rare in Norway, and is limited more or less to the stretches where there is no skerry guard. (The Principal Facts concerning Norwegian Territorial Waters, p. 5.)

The early claims as to exclusive rights in fisheries off the shore seem to have been acquiesced in by other maritime states and other states made similar claims. When these claims overlapped, conflicts arose and were often adjusted by treaties. The Scandinavian states maintained the 4-mile limit as a rule and before the World War regarded this as the neutral belt in time of war.

The report of the committee also says after referring to treaties of the fifteenth century:

During the two centuries then ensuing, the Kings of Norway felt induced to depart gradually from their old policy of claiming dominion over these Northern waters, and confined themselves by degrees to asserting sovereignty over certain stretches of water on the coasts. Finally, the range of vision was in certain respects considered and maintained as the limit of Norwegian territorial waters, also as regards the Northern seas. According to a Royal Decree of 20th June, 1691, the entire sea between Norway and Jutland, outside the range of vision from land, was to be considered as neutral waters. Further, by a treaty of December, 1691, between Norway and Denmark, on the one part, and Great Britain and the Netherlands on the other part, it was expressly stipulated that enemies of the two latter countries were not to be allowed to capture vessels belonging to the subjects of these countries within sight of any land belonging to the Danish Norwegian King. The Admiralty likewise applied this boundary limit in connection with the maintenance of neutrality. The range of vision was reckoned as 4 or 5 geographical miles from the outermost islets. (Ibid., p. 47.)

The "*Bangor*," 1915.—On March 14, 1915, the *Bangor*, a steamship flying the Norwegian flag and apparently under control of a German agent, was met at the mouth of the Strait of Magellan by a British vessel of war and put in charge of a prize crew. The *Bangor* was then taken to the Falkland Islands. Before the prize court the owners admitted liability to condemnation "unless she was immune from capture on the technical ground that she was at the time in waters alleged to be territorial waters of a neutral State."

The vessel was captured in the Strait of Magellan. According to the entry in the log she was captured when she was in the middle of the Strait of Magellan, about opposite Port Tamar anchorage. This agreed with the statement of the British naval officers. The Strait of Magellan is admitted to be 7 miles wide at that place. Strictly, therefore, the middle would not be within 3 miles of the land on either side.

The ship's master gave evidence that he took bearings which fixed his position much nearer the south shore than the line midway between the land on the north and south sides. His

evidence is not worthy of any credence, and I cannot accept any part of it as being true. Accordingly, if it is material to establish that the capture took place within 3 miles, or a marine league, of either shore, the claimants have not proved to my satisfaction that it did.

The limits of territorial waters, in relation to national and international rights and privileges, have of recent years been subject to much discussion. It may well be that the old marine league, which for long determined the boundaries of territorial waters, ought to be extended by reason of the enlarged range of guns used for shore protection. This case does not, in my view, call for any pronouncement upon that question. I am content to decide the question of law raised by the claimants upon the assumption that the capture took place within the territorial waters of the Republic of Chile.

This assumption, of course, does not imply any expression of opinion as to the character of the Strait of Magellan as between Chile and other nations.

This strait connects the two vast free oceans of the Atlantic and the Pacific. As such, the strait must be considered free for the commerce of all nations passing between the two oceans.

In 1879, the Government of the United States of America declared that it would not tolerate exclusive claims by any nation whatsoever to the Strait of Magellan, and would hold responsible any Government that undertook, no matter on what pretext, to lay any impost on its commerce through the strait.

Later, in 1881, the Republic of Chile entered into a treaty with the Argentine Republic by which the Strait of Magellan was declared to be neutralized for ever, and free navigation was guaranteed to the flags of all nations.

I have referred to these matters in order to show that there is a right of free passage through the Strait of Magellan for commercial purposes. It is not inconsistent with this that during war between any nations entitled to use it for commerce the Strait of Magellan should be regarded in whole or in part as the territorial waters of Chile, whose lands bound it on both sides. ([1916] P. p. 181; 5 Lloyd's Prize Cases, pp. 308, 313.)

While the court assumed for the purpose of this case that the *Bangor* was within territorial waters, it was stated this was a matter between the neutral and belligerent state and did not affect the rule relating to capture as between the belligerents, and the vessel and cargo were condemned.

The "Dresden," 1915.—One of the cases which arose in the first year of the World War gave rise to much discussion. This was the case of the *Dresden*, a German cruiser anchored, within 500 meters from the shore, in Cumberland Bay, in the island of Mas-a-Tierra, belonging to the Republic of Chile. The British fleet attacked the *Dresden*. The British Government stated they were "prepared to offer a full and ample apology," and then intimated that they were aiding in maintaining Chilean neutrality, etc., though affirming that they did "not wish to qualify the apology." The correspondence at the time, which was important, was as follows:

THE CHILEAN MINISTER TO SIR EDWARD GREY

(Received March 26)

(Translation.)

Sir,

In compliance with instructions from my Government, I have the honour to inform your Excellency of the facts which led to the sinking of the German cruiser *Dresden* in Chilean territorial waters, as they appear to be established by the information in the possession of the Chilean Government.

The cruiser cast anchor on the 9th March in Cumberland Bay, in the island of Mas-a-Tierra, belonging to the Juan Fernandez group, 500 metres from the shore, and her commander asked the Maritime Governor of the port for permission to remain there for eight days for the purpose of repairing her engines, which were, he said, out of order. The Maritime Governor refused to grant the request, as he considered it unfounded, and ordered the captain to leave the bay within 24 hours, threatening to intern the cruiser if her stay were prolonged beyond that period. Upon the expiry of the time stated the Maritime Governor proceeded to notify the captain of the *Dresden* that he had incurred the penalty imposed, and he immediately reported the situation which had arisen to the Governor of the Republic. Meanwhile on the 14th March, a British naval squadron, composed of the cruisers *Kent* and *Glasgow* and the armed transport *Orama*, arrived at Cumberland Bay and immediately opened fire upon the *Dresden* while she lay at anchor. The Maritime Governor who was making his way towards the *Glasgow* in order to carry out the usual obligations of courtesy, was compelled to return to land.

The *Dresden* hoisted a flag of truce, and despatched one of her officers to inform the *Glasgow* that she was in neutral waters, a circumstance disregarded by the British naval squadron, which summoned the *Dresden* to surrender, warning her that if she refused she would be destroyed. The captain of the *Dresden* then gave orders to blow up the powder magazine and sink the ship.

The act of hostility committed in Chilean territorial waters by the British naval squadron has painfully surprised my Government.

The internment of the *Dresden* had been notified to her captain by the Maritime Governor of Juan Fernandez, and the Government of the Republic, having been informed of what had occurred, would have proceeded to the subsequent steps had it not been for the intervention of the British naval squadron. Having regard to the geographical position of the islands of Juan Fernandez and to the difficulty of communication with the mainland, the only authority able to act in the matter did everything possible from the outset, and the internment of the *Dresden* was as effective and complete as the circumstances would permit when she was attacked by the British naval squadron. Even supposing that the British force feared that the *Dresden* intended to escape and to ignore the measures taken by the Maritime Governor of Juan Fernandez, and that this apprehension was adduced as the reason which determined its action, it should still be observed that the close watch which the British naval squadron could itself exercise precluded the possibility of the attempt. Moreover, no such eventuality was contemplated by the British squadron which, as I have said, did not give the Maritime Governor of Mas-a-Tierra the opportunity of explaining to the naval officer in command of the island the state of the *Dresden* in Cumberland Bay. The officer in command of the squadron acted *à priori* without pausing to consider that his action constituted a serious offence against the sovereignty of the country in whose territorial waters he was at the time. The traditions of the British navy are such that I feel convinced that if the officer who commanded the British squadron had received the Maritime Governor, who was going on board his ship in the fulfilment of his duty, and had been informed of the state of the interned vessel, he would not have opened fire upon her and would not have brought about the situation which now constrains my Government, in defence of their sovereign rights, to formulate the most energetic protest to His Britannic Majesty's Government.

Your Excellency will not be surprised that the attitude of the naval squadron should have aroused such deep feeling in Chile if you bear in mind the fact that the British warships composing

it had received, shortly before and upon repeated occasions, convincing proofs of the cordial friendship which unites us to Great Britain, and which finds its clearest and strongest expression in our respective navies. They had been supplied in the ports of the republic with everything which it was permissible for us to furnish consistent with our neutrality in the present European conflict. Nothing, therefore, could be a more painful surprise to us than to see our exceedingly cordial and friendly attitude repaid by an act which bears unfortunately all the evidences of contempt for our sovereign rights, although it is probable that nothing was further from the minds of those by whom it was unthinkingly committed.

Nor will your Excellency be astonished that my Government should show themselves to be very jealous of the rights and prerogatives inherent in the exercise of sovereignty. Nations which lack powerful material means of making their rights respected have no other guarantee and protection for their life and prosperity than the clear and perfect understanding and the exact and scrupulous fulfillment of the obligations incumbent upon them towards other nations, and the right to demand that other nations shall equally observe their duties towards them. Few nations have given more convincing proofs than Great Britain of their desire to comply with international obligations and to require compliance from others, and few have shown more eloquently their respect for the rights and prerogatives both of great and small nations. These facts convince my Government that His Britannic Majesty's Government will give them satisfaction for the act committed by the British naval forces of a character to correspond with the frankly cordial relations existing between them. Nothing could be more deeply deplored by the Chilean Government than that the traditional bonds of friendship uniting the two peoples, which my Government value so highly and upon which they base so many hopes of new and mutual benefits, should fail to derive on this occasion additional strength from the test to which circumstances have subjected them.

I have, &c.

AGUSTINE EDWARDS.

No. 2. SIR EDWARD GREY TO THE CHILEAN MINISTER

FOREIGN OFFICE, *March 30, 1915.*

Sir,

HIS Majesty's Government, after receiving the communication from the Chilean Government of the 26th March, deeply regret that any misunderstanding should have arisen which should be a cause of complaint to the Chilean Government; and, on the facts

as stated in the communication made to them, they are prepared to offer a full and ample apology to the Chilean Government.

His Majesty's Government, before receiving the communication from the Chilean Government, could only conjecture the actual facts at the time when the *Dresden* was discovered by the British squadron; and even now they are not in possession of a full account of his action by the captain of the *Glasgow*. Such information as they have points to the fact that the *Dresden* had not accepted internment, and still had her colours flying and her guns trained. If this was so, and if there were no means available on the spot and at the moment for enforcing the decision of the Chilean authorities to intern the *Dresden* she might obviously, had not the British ships taken action, have escaped again to attack British commerce. It is believed that the island where the *Dresden* had taken refuge is not connected with the mainland by cable. In these circumstances, if the *Dresden* still had her colours flying and her guns trained, the captain of the *Glasgow* probably assumed, especially in view of the past action of the *Dresden*, that she was defying the Chilean authorities and abusing Chilean neutrality, and was only awaiting a favourable opportunity to sally out and attack British commerce again.

If these really were the circumstances, His Majesty's Government cannot but feel that they explain the action taken by the captain of the British ship; but, in view of the length of time that it may take to clear up all the circumstances and of the communication that the Chilean Government have made of the view that they take from the information they have of the circumstances, His Majesty's Government do not wish to qualify the apology that they now present to the Chilean Government.

I have, &c.

E. GREY.

(British Parliamentary Papers, Misc. No. 9 [1915], [Cd. 7859].)

Inviolability of neutral waters.—Neutral waters, while generally open to innocent passage of belligerent vessels in time of war, may be closed and have been closed to vessels of war and vessels assimilated thereto.

A vessel in distress is, however, permitted to enter and is granted necessary asylum and may make such repairs as are needed to make the vessel seaworthy. If a vessel enters neutral waters to escape capture, the neutral state is usually under obligation to intern the vessel after 24 hours' sojourn.

A vessel of war might, from within neutral waters, resist an attack or a continuation of an operation, but when the vessel in neutral waters ceases operations or is no longer able to continue the resistance, no further belligerent action may be taken.

While it might be possible to permit a vessel of war of one belligerent to rescue the distressed crew of a vessel of war of another belligerent even in territorial waters of a neutral, this would be merely as an act of humanity and not as an act of war and the crew should be turned over to the neutral state or should be merely detained.

The "Thor," 1914.—In the Royal Court of St. Lucia on October 30, 1914, a decision was rendered in the case of the *Thor*, a Norwegian steamer loaded with coal originally chartered by the Inter-American Steamship Line; later receiving on board a German supercargo in the person of one Weiler, a chief petty officer of the German Naval Reserve who gave the captain of the *Thor* the following letter:

We beg to inform you that we have re-let the steamer for about three months to the Hamburg-Amerika Line, of New York, and in accordance with clause 12 they will send a supercargo with your steamer whose instructions you will please follow. We request you to do all possible for the interests of the Hamburg-Amerika Line; and their superintendent, who goes with the steamer, has instructions to allow you very liberal gratuities.

The judge in this case after considering that from August 9 to August 26 the *Thor* was "steaming up and down with two German colliers and one other neutral collier chartered by a German firm, all clearly, waiting for something to coal" said:

It therefore becomes necessary to consider whether her behaviour amounted to unneutral service, and for that purpose to ascertain what modification, if any, has been effected by the Declaration of London in the law on that point.

The English rule was this: "A neutral vessel chartered or employed by a belligerent Government to carry a cargo on its

behalf and acting under the orders or direction of that Government or of its officers is liable to condemnation as an enemy ship, together with the cargo so carried"—The *Rebecca* 1811 (2 Acton, 119). The formula submitted to the Conference was more epigrammatic, but equally effective; it provided that merchant vessels "entièrement ou spécialement au service du belligérant ennemi" should lose their neutral character. (1 Trehern, British and Colonial Prize Cases, p. 229.)

The *Thor* was condemned as lawful prize.

Liability of the "Petro."—The nationality of the *Petro*, the tanker from which the cruiser *Xerxes* of State X is refueling is not stated. If it was a naval tanker it would be liable to the same treatment as a vessel of war. If it was a tanker owned by private enemy parties, it would be serving as an auxiliary and would be liable to be sunk. If it was a neutral tanker it would be similarly liable as engaged in unneutral service. Such a neutral vessel has so far identified itself with the belligerent as to render itself liable to the same treatment as a belligerent vessel.

Submerged reefs.—While there have been arguments from time to time in favor of the determination of jurisdiction over coastal waters based on navigability or upon depth, such arguments have not been generally accepted. If the principle of navigability had been accepted, the problem of fixing the depth line for draft of ships would have had many analogies to the problem of the range of cannon shot. There would have been other problems arising from the changing and shifting depths of waters along certain coasts.

In August, 1925, certain questions arose in the case of *United States v. Henning et al.* in regard to the status of Sea Horse Reef, 16 miles off the west coast of Florida. It was contended that this was a part of the coast of the United States, but the court did not "concede this construction." (7 Fed. 2d series, p. 488.)

Neutral rights and duties.—From the varied practice and theories, it is apparent that there is not complete agreement as to jurisdiction over waters off a coast dotted

with islands, reefs, etc. By article 1 of XIII Hague Convention belligerents are bound to respect the rights of neutral powers. It can not be presumed that a vessel taking fuel in neutral jurisdiction is necessarily exceeding its rights, but by article 25 of XIII Hague Convention,

A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Articles occurring in its ports or roadsteads or in its waters. (1908, Naval War College, International Law Situation, p. 220.)

If a belligerent protests to a neutral that an enemy is violating a provision of the laws of neutrality and the neutral takes no action, the belligerent may presume that the neutral is not able to prevent the violation or that it does not regard the contention as valid. A neutral is not obliged to assume jurisdiction along its coast beyond 3 miles. The belligerent must then determine what action to take for its own protection and if under ordinary conditions no possibility of violation of neutral rights were involved the belligerent might lawfully attack its enemy.

If one belligerent attacks another, even within neutral jurisdiction, the attacked belligerent may lawfully defend itself from such attack and so far as possible render its enemy unable to continue operations.

Protective jurisdiction.—That a certain degree of protective jurisdiction may in specific case extend beyond the 3-mile jurisdiction is admitted. In 1864 in referring to the French position that the *Alabama* and *Kearsarge* should not engage in such proximity to the French coast as would put it in danger from shell fire, the United States, while heeding the request, did not admit that French jurisdiction extended beyond 3 miles. (1904, Naval War College, International Law Situations, pp. 132-134.) In the same year the question was again raised when the U. S. S. *Rhode Island* fired upon the

Margaret and Jessie off Eluthera and the British Government expressed the opinion:

that vessels should not fire toward a neutral shore at a less distance than that which would insure shot not falling into neutral waters, or in a neutral territory. (Ibid., p. 135.)

Belligerent control of neutral vessels.—A belligerent is entitled to humane treatment in time of distress. This was provided for in the 1907 Hague Convention for the Adaptation to Naval War of the Principles of the Geneva Convention. For example, article 9 is to the following effect:

Belligerents may appeal to the charity of the commanders of neutral merchant ships, yachts, or boats to take on board and tend the sick and wounded.

Vessels responding to this appeal, and also vessels which have of their own accord rescued sick, wounded, or shipwrecked men, shall enjoy special protection and certain immunities. In no case can they be captured for having such persons on board, but, apart from special undertakings that have been made to them, they remain liable to capture for any violations of neutrality they may have committed. (1908, Naval War College, International Law Situations, p. 205.)

This article 9 refers to neutral vessels which of their own accord take on board sick, wounded, or shipwrecked men and to neutral vessels which on request take on board sick and wounded.

The reference to "sick and wounded" in the first paragraph and to "sick, wounded, or shipwrecked" in the second paragraph of article 9 was not by inadvertence but was considered at The Hague Conference in 1907. M. Louis Renault, the reporter for the subcommission which had this convention in charge, in the discussion, says:

In 1899 it was asked what should be the fate of the sick, wounded, and shipwrecked. They may, as a matter of fact, be in very different situations: on hospital ships of the State, on hospital ships of national or neutral relief societies, or on merchant vessels of hostile or neutral nationality. There has been much discussion on this point, and very different solutions have

been introduced into the additional articles of 1868. After mature reflection, we agreed to base our action on a very simple principle: A belligerent who duly has in his possession combatants of the adversary has a right to make them prisoners of war; if the combatants are sick or wounded, it is his duty to care for them. It is only necessary to apply this principle to the various cases which may arise: A cruiser meets a hospital ship (batiment hôpital) or a "hospitable" ship (bâtiment hospitalier), and has a right to search it and supervise what takes place thereon. It finds sick, wounded, and shipwrecked persons, and has an absolute right to consider them as prisoners. In most cases, as far as the sick and wounded are concerned, it is entirely to the advantage of the cruiser to leave them where they are, for it would have to transport and care for them. But it may also happen that it will be in its interest to treat some of them as prisoners; this is more particularly the case with the shipwrecked persons. It matters little on board of what vessel these sick, wounded, or shipwrecked persons are found, provided they are duly in the possession of the enemy. This is the case whenever a belligerent cruiser meets on the high seas any vessel other than a neutral war vessel. (3 Proceedings of the Hague Peace Conferences, Carnegie Endowment for International Peace, p. 568.)

Salvaging.—Salvaging of public ships by private agencies may be on the same basis as the salvaging of private ships. The difficulties that have most often arisen have been in connection with the payment for such services when it has been impossible for the salvor to bring action against the public ships. As was said in the British court in the case of the *Porto Alexandre* ([1920] P., p. 30.):

These are matters to be dealt with by negotiations between governments, and not by governments exercising their power to interfere with the property of other States contrary to the principles of international courtesy which govern the relations between independent and sovereign States.

That salvaging operations of a neutral on the high sea in behalf of one belligerent should not interfere with the exercise of the rights of the other belligerent as against his enemy is admitted without argument. Indeed the neutral salvaging vessel must to escape risk avoid any

participation in the hostilities and may act only for the preservation of the vessel of war against the forces of nature. The salvaging must be clearly distinguished from obligations which might arise under the Hague Convention for the Adaptation to Naval War of the Principles of the Geneva Convention.

Discussion, 1930.—Certain matters in regard to the general nature of salvage arose in the consideration of Situation II and the discussion may be found in Naval War College, International Law Situations, 1930, pages 84–90.

Obligation to rescue.—While the obligation of a neutral private vessel to rescue shipwrecked personnel of a vessel of war may be recognized, there is no obligation to take the personnel from a vessel of war in anticipation that it may be sunk by an enemy.

Vessels of war are subject to the risks of war.

Neutral private vessels are under no obligations to participate to the advantage of either belligerent.

The fact that a vessel of war of one belligerent can not accommodate on board the personnel of an enemy vessel of war does not place a neutral under special obligation to either party.

By article 16 of the 1907 Hague Convention for the Adaptation to Naval War of the Principles of the Geneva Convention, it is prescribed that:

After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill treatment. (1908, Naval War College, International Law Situations, p. 207.)

SOLUTION

(a) As neutral State R takes no action, the action of submarine *Y 50* is lawful. The defense of cruiser *Xerxes* is lawful, but the taking of the crew of the beached *Y 50* as prisoners of war is not lawful.

State X has no ground for valid protest.

State Y may protest against the taking of the crew of *Y 50* as prisoners of war.

State R may protest against the action of the *Xerxes* in entering its waters and making the crew of *Y 50* prisoners of war.

(b) The place of salvaging is in the high sea and the salvaging operations are lawful. The salvaging vessel is under obligation to cease operations but under no obligation to take the crew of the *Xenophon* on board. The relative weakness of the submarine *Y 51* gives it no right to demand exceptional services from the salvaging vessel. The *Xenophon's* armament and boats being intact, the conditions for which the Hague-Geneva Convention provides have not arisen, and the salvaging vessel may decline to take any action except to discontinue salvaging operations unless upon agreement of all parties.

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